(16,158.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 109

WILLIAM HOLDER, PLAINTIFF IN ERROR,

vs.

AULTMAN, MILLER & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 10, 1897.

1 *Narr.*

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss*:

Aultman, Miller & Co., a manufacturing corporation organized and existing under the laws of the State of Ohio, and who is a citizen of the State of Ohio, by Fred. A. Baker, its attorney, complains of William Holder, a resident of the village of Laingsburg, in the county of Shiawassee, in the eastern district of Michigan, and who is a citizen of the State of Michigan, the defendant herein, in plea of trespass on the case upon promises, filing this declaration as commencement of suit, &c.

For that whereas heretofore, to wit, on the 1st day of January, 1894, the said plaintiff was a corporation, organized under the laws of the State of Ohio for the purpose of engaging in the business of manufacturing agricultural implements and machinery, with its manufacturing establishment and its office for doing business located at the city of Akron, in the county of Summit, in the State of Ohio, and the authorized and actual capital stock of said corporation being one million of dollars, to wit, at the city of Lansing, in said eastern district of Michigan;

And whereas, afterwards, to wit, on the 27th day of February, at the said village of Laingsburg and at the city of Lansing, in the eastern district of Michigan, the said plaintiff, by D. C. Gillett
2 and R. H. Worth, its duly authorized agents, entered into a written contract with the defendant, William Holder, in the words and figures following—that is to say:

This agreement, made this 20th day of February, A. D. 1894, between Aultman, Miller & Co. (a corporation duly incorporated under the laws of the State of Ohio), of Akron, Ohio, of the first part, and William Holder of Laingsburg, county of Shiawassee and State of Michigan, of the second part, witnesseth: That the party of the second part is hereby authorized to sell Buckeye mowers, reapers, and binders, and extra parts thereof, in the following territory and vicinity and Elsie & vicinity including the township of Washington and Elban Gratiot county, Chapin in Saginaw Co. and the west half of Fairfield in Shiawassee Co., for and during the season of 1894, on the following terms and conditions, viz: The party of the second part agrees:

First. To use all reasonable diligence in canvassing and supplying said territory with said machines and in maintaining their reputation in preference to any other kind of mowers and combined mowing and reaping machines and harvesters and binders, and not to canvass or solicit outside of the above territories.

Second. To sell the said machines at the retail list prices authorized by said first party, with freight and charges from Laingsburg added thereto, on the following terms viz: One-half, October 1, 1894, ½ Oct. 1st, 1895. In extreme cases one-third October 1, 1894, one-third October 1, 1895, one-third October 1, 1896, shall be allowed on binders only for which settlement must be made with the purchaser on the delivery of machines, and to grant credit to such persons only as are of well-known responsibility and of good reputation for the payment of their debts, to see that all notes taken for
3 machine- sold are drawn on blanks furnished by the said first party, and signed by one or more persons of well-known responsibility and in all cases of doubt as to the responsibility of the purchaser to require a mortgage of property real or personal amply sufficient to secure a payment in full of all such notes, all notes bear interest as specified in the blanks provided by first party, and in no instance to run beyond the time above mentioned. And if at any time the party of the first part shall learn that any of the said notes were not signed by persons of well-known responsibility, then the party of the second part agrees to redeem all such notes, with accrued interest, in cash or approved notes at the option of the party of the first part.

Third. To endorse with waiver of protest and notice of non-payment, all notes given by renters and parties owning no real estate, unless sufficiently secured by chattel mortgage or otherwise and all notes which on examination by a banker or other competent authority, chosen by the first party or its general agent, are pronounced not good or insufficiently secured.

Fourth. That all machines and parts of machines and all other goods received on commission under this contract shall be held by the said second party on special storage and deposit as the property of the party of the first part, until converted into notes or money, as herein provided, which notes are to be received by said second party and held on special deposit as the property of said Aultman, Miller & Co. until forwarded to said Aultman, Miller & Co. or delivered to their authorized agents.

That in all cases where machines are sold for cash or part cash and notes, all such cash received shall be promptly remitted to
4 Aultman, Miller & Co. Akron Ohio, or their authorized agent and that any and all sums of money that may *be* in any case become due and owing from said party of the second part, to said party of the first part shall be collectible without any relief whatever from valuation or appraisement laws.

Fifth. To see that all machines sold are properly set up and started, and as far as possible, that they give satisfaction to the purchaser and to keep a correct record of sales, showing the time and post-office address of each purchaser, with price term and date of sale, said record of sales to be reported to the party of the first part at its request, and at all times to be subject to the inspection of its general agent.

Sixth. To receive all machines, extras or other goods shipped or delivered on account of said first party, to pay the freight on them,

keep them well housed, well cared for free from taxes and to insure in a reliable company all goods of every nature on hand that belong to Aultman, Miller & Co., with loss or damage on the same made payable to Aultman, Miller & Co. as their interest in said property may appear, at the time of said loss or damage. To keep all unsold goods well housed and cared for, subject to the order of party of the first part until renewal of this contract, or if necessary up to May 1, 1895, and in no case making charge for handling or storing the same ordinary freight charges in all cases to follow machines and extras reshipped, but no express charges shall follow goods reshipped, nor shall the party of the first part in any case be obliged to pay express charges of goods shipped to the party of the second part.

Seventh. In furnishing repairs free of charge to customers, to do so only when there is a flaw or defect in the original and in
5 all cases of repairs so furnished to have on hand the broken or drfective pieces to show at settlement and to deliver the same to the party of the first part, or otherwise bills of this kind will not be allowed and in no case whatever to take from any machine belonging to the first party any part thereof as extras or repairs, to pay at settlement for all machines on hand in case of a violation of this clause.

Eight. To make prompt and accurate reports of machines on hand as often as requested by the first party or its general agent, to promptly execute orders for transfer of machines if any are on hand unsold and in case of failure to make such reports or transfers to pay said first party for all machines remaining on hand at settlement unsold by reason of such failure, at the option of said first party.

Ninth. To sell or assist in the sale of no other mowing machines, or combined mowing and reaping machines, or harvesters and binders, in said territory, during the continuance of this contract and not to purchase, keep in stock or offer for sale binding twine, knives, sickles, sections or other parts of the Buckeye machines manufactured and furnished by any other than the first party.

Tenth. To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time.

Eleventh. To publish a notice of this agency in any one or more newspapers in the above-named territory during the months of April, May and June, without charge to the first party hereto. To receive and pay transportation charges on all advertising matter forwarded by said first party, and to see that it is properly distributed among the farmers of the above-described territory.

6 The party of the first part further agrees with the party of the second part:

First. To furnish to said second party such machines of the kinds they make as may be wanted to supply said territory, so long as their stock on hand will enable them to fill the orders. No commission will be allowed on orders taken and not filled nor on machines which have for any cause been returned and in no case shall the party of the second part be entitled to a commission on a sale

where the machine has not been delivered and properly set up and started to the satisfaction of the purchaser and settled for. Nor shall any commission whatever be due said second party until a full settlement of account is made, and that the said second party be ready to make settlement on demand to the first party or their authorized agents.

Second. To allow said second party as compensation for receiving, handling, storing, settling, setting up and starting machines and making collections, whenever required, a commission equal to an amount which deducted from the price for which the machines have been sold after deducting other allowances of every nature, will make the net amount to be retained by the said first party in notes and cash in the same proportion as taken for machines sold as follows:

Freight allowed.	Width of cut.	If sold for cash.	If sold for notes.
Buckeye light mower 1 horse	3 ft. 9 in.	32 00	34 00 each
" " "	4 " 3 "	33 00	35 00 "
New Buckeye mower	4 " 6 "	34 00	36 00
" " " two combined	4 " 6 "		
Buckeye mower	5 "	35 00	37 00
7 Buckeye mower	6 feet	40 00	42 00 "
New Buckeye table rake	5 " 2 in.		
New Buckeye dropper	5 " 2 "		
Buckeye frameless binder	5 "	90 00	90 00 "
Buckeye frameless binder	6 "	90 00	95 00 "
Buckeye frameless binder	7 "		
Buckeye Banner binder	5 " 3 "	90 00	95 00 "
Buckeye bundle-carrier for binders		4 50	
Buckeye flax and clover dump		2 70	
Buckeye binder truck, two-wheeled		6 75	

Where an outfit consists of binders, truck and bundles carrier is sold to one person the net cash price shall be $95.00 time price $95.00 for 5 ft. machines and $95.00 cash or $100.00 time for 6-ft. machines.

Third. To furnish the said second party a stock of extra casting and other repairs (excepting knives, sickles knife and sickle heels sections rivets, guards, canvasses pitman ferrules, spring keys, brass boxes, chain link and other net goods) from the prices of which as found in the published price-list a commission of 25 per cent. will be allowed, all such extras sold to be paid for in cash on demand of the first party or their authorized agents.

Fourth. To sell to said second party knives and sickles and knife and sickle heels guard, section and rivets at a discount of 50 per cent. and pitman ferrules, spring keys, brass boxes, chains links, canvasses, bolts and other net goods, at a discount of 50 per cent all to be paid for in cash on or before the first day of August, 1894.

Fifth. To furnish said second party blank notes, orders
8 circular- and posters and such other printed documents as they are accustomed to supply their agents.

NOTICE.—It is especially agreed that when sales have not been closed by cash or notes on or before delivery as stated above then the party of the first part may send a persen to settle with the purchasers of machines and the party of the second part shall pay all the expenses of making such settlements. It is further agreed that Aultman, Miller & Co. shall not be held liable under any written or printed warrant*ly* given by them on their machines that are allowed to go out without first having been settled for. No canvass- or expert that may be sent to aid you shall have any authority to make any change whatever in our contract with you, and all sales made by him will he subject to your approval or rejection as no allowance will be made to you for loss of interest or reduction in price on sales made by him. Nor will any promise not authorized in writing by our manager at Lansing, Mich., be recognized at settlement and the first party reserves the right to rescind or annul this contract at any time that the said party of the second part shall violate or neglect to fulfill any of the above stipulations.

In witness whereof, the parties hereunto have set their hands the day and date above written.

This contract not valid unless countersigned by our manager at Lansing, Mich.

AULTMAN, MILLER & CO.

App. at Akron by D. C. Gillett.

WM. HOLDER.

Countersigned, Lansing, Mich., Feb. 27th, 1894.
R. H. WORTH, *Manager.*

9 And whereas, afterwards, to wit, on the 27th day of April, 1894, the said written contract was approved by the plaintiff at its office in the city of Akron, in the State of Ohio, and the same then and there became and was a binding and valid contract between the defendant and the plaintiff, according to the terms thereof, to wit, at the city of Lansing, in the eastern district of Michigan.

And the plaintiff avers that it faithfully performed said contract on its part, and between, to wit, the 27th day of February, 1894, and the 1st day of September, 1894, under and in pursuance of said contract and at the request of said defendant, it shipped from Akron, Ohio, to said defendant at Laingsburg, Michigan, a large number of Buckeye mowers and reapers and binders and extra parts or repairs for the same, to wit, 100 Buckeye mowers and 100 Buckeye reapers and binders and 200 extra castings, parts, and repairs, all of great value and price, to wit, of the value and price of ten thousand dollars, to wit, at Laingsburg, in the eastern district of Michigan.

And the plaintiff further avers that on and between the dates last aforesaid the said mowers and reapers and binders and the said extras were received by the said defendant under and in pursuance of said contract, and the same were sold and disposed of by him to divers farmers and customers in the townships named in said contract, and that on, to wit, the 1st day of September, 1894, there was

due and owing to the plaintiff for and on account of the sales so made by him under said contract a large sum of money, to wit, the sum of five thousand and fifty-two and $\frac{56}{100}$ dollars, and which sum of money the said defendant then and there promised to pay
10 to the plaintiff on demand, yet the said defendant hath disregarded his said promise and hath not, although often *been* requested so to do, paid the said sum of money or any part thereof to the plaintiff, to wit, at Laingsburg, in said eastern district of Michigan.

11 Also, for that whereas the defendant, heretofore, to wit, on the 1st day of September, A. D. 1894, at Laingsburg, in said county of Shiawassee, in the said eastern district of Michigan, was indebted to the plaintiff in the sum of six thousand dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendant at his request.

And like sum for the price and value of work then and there done and materials for the same provided by the plaintiff for the defendant at his request.

And in like sum for money then and there lent by the plaintiff to the defendant at his request.

And in like sum for money then and there paid by the plaintiff for the use of the defendant at his request.

And in like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them.

12 And thereupon the said defendant afterwards, and on the day and year aforesaid, in consideration of the premises, respectively then and there promised the plaintiff to pay it the said several sums of money respectively on request; yet the said defendant hath disregarded his said promises and hath not (although often requested so to do) paid any of the sums of money or any part thereof to the plaintiff, to the plaintiff's damages of six thousand dollars, and therefore it brings suit, etc.

FRED. A. BAKER,
Plaintiff's Attorney.

To the above-named defendants:

Take notice that on the trial of the above cause the plaintiff, under the money counts, will give in evidence certain cop- of which — given below.

____ ____.
Plaintiff's Attorney.

13 I acknowledge myself as security for any costs that may be awarded against the plaintiff herein.

FRED. A. BAKER.

Detroit, September 21, 1894.

14 *Notice to Plead.*

The Circuit Court of the United States for the Eastern District of Michigan.

AULTMAN, MILLER & Co.
vs.
WILLIAM HOLDER. } No. 8044.

Narr.

To the within-named defendants:

Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of suit, a rule was entered in the book of common rules kept by the clerk of said court, in his office, in the city of Detroit, requiring you to appear and plead to said declaration within twenty days after service on you of a copy thereof and notice of said rule, or judgment, etc.

Yours, etc.,
FRED. A. BAKER,
Attorney for Plaintiff.

DETROIT, *Sept.* 21, *A. D.* 1894.

Filed September 21, A. D. 1894.
WALTER S. HARSHA, *Clerk.*

FRED. A. BAKER,
Attorney for Plaintiff.

15 *Entry of Rule to Plead.*

In the Circuit Court of the United States for the Eastern District of Michigan.

AULTMAN, MILLER & Co.
v.
WILLIAM HOLDER. } No. 8044.

On filing declaration in this cause as commencement of suit and on motion of Fred. A. Baker, attorney for the plaintiff, it is ordered that the said defendant do appear and plead to plaintiff's declaration within twenty days after service upon it of a copy thereof and notice of the entry of this rule to plead, or judgment, &c.

WALTER S. HARSHA, *Clerk.*

FRED. A. BAKER,
Attorney for Plaintiff.

Sept. 21st, 1894.

16 *Plea and Notice.*

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

AULTMAN, MILLER & Co., a Corporation, Plaintiff,
vs.
WILLIAM HOLDER, Defendant.

And now comes defendant, William Holder, by his attorneys, Wood & Wood, and demands a trial of the matters set forth in the plaintiff's declaration.

Yours, etc.,

WOOD & WOOD,
Attorneys for Defendant.

To Fred. A. Baker, attorney for plaintiff:

Please take notice that on the trial of said cause defendant will show, under the general issue above pleaded:

First. That said plaintiff is a foreign corporation, organized and existing under the laws of the State of Ohio, and having its principal and corporate office in the city of Akron, in said State.

Second. That act No. 182 of the laws of Michigan for the year one thousand eight hundred and ninety-one, as amended by act No. 79 of the laws of Michigan for the year one thousand
17 eight hundred and ninety-three, provides that "every foreign corporation or association which shall hereafter be permitted to transact business in this State which shall not prior to the passage of this act have filed or recorded its articles of association under the laws of this State and been hereby authorized to do business therein shall pay to the secretary of state a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof, and that every corporation heretofore organized or doing business in this State which shall hereafter increase the amount of its authorized capital stock shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association and a proportionate fee upon any and each subsequent increase thereof: Provided that the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars, and in case any corporation or association hereafter incorporated under the law of this State, or foreign corporation authorized to do business in this State, has no authorized capital stock, than in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the first day of January, eighteen hundred ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly void.

This act is ordered to take immediate effect.

Approved May 13, 1893."

18 Third. That the contract set forth in plaintiff's declaration and upon which right of recovery is based was made and is to be performed in the State of Michigan within the meaning of the said act.

Fourth. That said plaintiff, being foreign corporation, was at the time of the execution of said contract doing business in the State of Michigan within the meaning and application of said statute.

Fifth. That said plaintiff has not complied with the requirements of said statute; that neither prior nor subsequent to the passage of said statute has it filed or recorded its articles of association with the secretary of state for the State of Michigan, neither has it paid to said secretary of state the franchise fee of one-half of one mill upon each dollar of its authorized capital stock.

Sixth. That owing to plaintiff's non-compliance with said Michigan statute the said contract is absolutely void and without force as against defendant.

Yours, etc.,

WOOD & WOOD,
Attorneys for Defendant.

8044. United States of America. The circuit court of the United States for the eastern district of Michigan. Aultman, Miller & Co. *vs.* William Holder. Defendant's plea and notice. Filed in clerk's office October 4, 1894. Walter S. Harsha, clerk.

19 *Waiver of Jury.*

In the Circuit Court of the United States for the Eastern District of Michigan.

AULTMAN, MILLER & Co.
vs.
WILLIAM HOLDER. } No. 8044.

It is hereby stipulated and agreed by the attorney- for the respective parties that the jury in this cause be, and the same is hereby, waived, and that said cause be tried by the court.

F. A. BAKER,
Attorney for Plaintiff.
WOOD & WOOD,
Attorneys for Defendant.

Filed in clerk's office Nov. 3rd, 1894.

WALTER S. HARSHA, *Clerk.*

20 *Trial Before Court Submitted.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Saturday, the third day of November, in the year one thousand eight hundred and ninety-four.

Present: The Honorable Henry H. Swan, district judge.

AULTMAN, MILLER & CO.
vs.
WILLIAM HOLDER. } 8044.

The parties in this cause being in court, by their respective attorneys, ready for trial, having filed a written waiver of jury, the court now hears the proofs and allegations of the parties and the arguments of counsel, and thereupon said cause was submitted.

21 *Judgment for Plaintiff.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court-room, in the city of Detroit, on Monday, May thirteenth, in the year one thousand eight hundred and ninety-five.

Present: The Honorable Henry H. Swan, district judge.

AULTMAN, MILLER & COMPANY
vs.
WILLIAM HOLDER.

This cause having been heretofore tried by the court without a jury and duly submitted, the premises having been seen, considered, and due deliberation thereon having been had, the said court now here finds that the said defendant did undertake and promise in manner and form as the said plaintiff hath in its declaration in this cause complained against him, and assesses the damages of the said plaintiff on occasion of the said premises at the sum of five thousand two hundred twelve dollars and fifty-six cents ($5,212.56).

Thereupon, on motion of Mr. F. A. Baker, attorney for said plaintiff, it is by the said court now here considered that the said plaintiff do recover against the said defendant its damages aforesaid, together with its costs and charges by it about its suit in this behalf expended, to be taxed, and that said plaintiff have execution therefore.

22 *Opinion of Judge Swan.*

In the Circuit Court of the United States for the Eastern District of Michigan.

AULTMAN, MILLER & COMPANY
v.
WILLIAM HOLDER. } No. 8044.

MAY 13, 1895.

Messrs. F. A. Baker, C. L. Sadler, C. C. Kirkpatrick, for plaintiff; Messrs. Wood & Wood, for defendant.

The plaintiff is a corporation organized under the laws of the State of Ohio, and is engaged in the business of manufacturing agri-

cultural implements at Akron, in that State, and sells reapers and mowers in Michigan through local agents at different places, who sell on commission for the company and as its agents. A written contract is entered into between the company and the agent similar in form to that sued upon in this case. The action is assumpsit and is brought against the defendant, William Holder, who is a citizen of Michigan, resident of Lansing, and acted for the plaintiff as a commission agent under the contract executed by himself at Lansing February 27th, 1894, and there countersigned by the local agent of the plaintiff under these provisions of the contract: "This contract not valid unless countersigned by our manager at Lansing and approved at Akron." The parties have signed and filed a stipulation of facts of which the following is a copy:

23 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

AULTMAN, MILLER & Co. (a Corporation), Plaintiff,
v.
WILLIAM HOLDER, Defendant.

To said court:

It is agreed between the parties to the above action that the following facts are agreed upon without the submission of evidence, and the parties ask that this stipulation of facts be made a part of the record:

First. It is agreed that the contract referred to between the parties was executed, accepted, and approved as set forth in the said contract.

Second. It is agreed that the provisions of the contract, in so far as plaintiff is concerned, have been fulfilled.

Third. It is agreed that the balance due, amounting to five thousand and fifty-two and fifty-six hundredths dollars ($5,052.56), is correct.

Fourth. It is agreed and admitted that Aultman, Miller & Co. is a corporation organized and existing under the general laws of Ohio, having its corporate office in the city of Akron, county of Summit and State of Ohio, and having its manufactory at the same place.

24 Fifth. It is agreed and admitted that Aultman, Miller & Co. does not manufacture any goods whatever within the State of Michigan.

Sixth. It is agreed that Aultman, Miller & Co. sells its goods by means of local commission agents, and that it has a general agent at the city of Lansing, and that its commission agents are under similar contracts with the plaintiff to the one set forth in this action.

Seventh. It is agreed and admitted that all contracts are sent to Aultman, Miller & Co., at Akron, Ohio, for approval or rejection, before taking any effect.

Eighth. It is agreed and admitted that the goods sold by Aultman, Miller & Co. in the State of Michigan and manufactured at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agents, forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent or in bulk to Lansing or various points throughout the State and reshipped in smaller lots direct to the commission agent.

Ninth. It is agreed and admitted that Aultman, Miller & Co. own a warehouse in the city of Lansing for the transfer of such reshipments, for the temporary storage of a small stock of extras or repairs, which experience has shown may be suddenly needed by customers throughout the State during the harvest season. A portion of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of their customers. These are partially commission goods and partially goods sold direct to them.

25 Tenth. It is agreed and admitted that accounts with every commission agent in the State of Michigan are kept at the office of the plaintiff in Akron, Ohio.

Eleventh. It is agreed and admitted that the plaintiff effects settlement with its commission agents by sending to its general agent copies or statements of all such accounts; that the general agent and his assistant check over the season's work with the commission agent, collect pay for the machines sold in notes or cash, or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and that the notes so taken are subject to the approval or rejection of the plaintiff.

Twelfth. It is agreed and admitted that all notes taken by the commission agents of Aultman, Miller & Co. are sent through its general agent at Lansing to the factory at Akron, Ohio, where they are numbered, recorded, filed, and retained until just before maturity, when they are sent direct to banks or express companies for collection and remittance direct to Akron, Ohio.

F. A. BAKER,
Attorney for Plaintiff.
WOOD & WOOD,
Attorneys for Defendant.

26 As will be seen, it is agreed and admitted that the balance due the plaintiff from the defendant arising out of the business done by the defendant for the plaintiff at Lansing as its agent, as aforesaid, under the contract referred to, amounted on the 3rd day of November, 1894, to $5,052.56. The declaration sets forth fully the breaches of contract relied upon by the plaintiff from which this balance arose. The plea of the defendant is the general issue, with notice in accordance with the authorized purpose at law in the courts of Michigan; that the defendant will show under said plea that act No. 182 of the laws of Michigan for the year 1891, as amended by act No. 179 of the laws of Michigan for the year 1893, provides that "every foreign corporation or association which shall

hereafter be permitted to transact business in this State which shall not prior to the passage of this act have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein shall pay to the secretary of state the franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association and a proportionate fee upon any and each subsequent increase thereof, and that every corporation heretofore organized or doing business in this State, which shall hereafter increase the amount of the capital stock, shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association and a proportionate fee upon any and each subsequent increase thereof: Provided that the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorporated under the law of this State or foreign
27 corporation authorized to do business in this State has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the first day of January, 1894, by any corporation which has not first complied with the provisions of this act shall be wholly void. This act is ordered to take immediate effect. Approved May 15th, 1893."

The notice further declares that the contract set forth in plaintiff's declaration, and upon which right of recovery is based, was made and is to be performed in the State of Michigan, within the meaning of the said act; also that said plaintiff, being the foreign corporation, was at the time of the execution of said contract doing business in the State of Michigan within the meaning and application of said statute, and has not complied with the requirements thereof, nor before nor since the passage of such statute has it filed or recorded its articles of association with the secretary of state for the State of Michigan, nor paid to said secretary of state the franchise fee of one-half of one mill upon each dollar of its authorized capital stock; that, owing to plaintiff's non-compliance with said statute, the said contract is absolutely void and without force as against said defendant.

28 SWAN, *J.:*

The questions arising in this case have been argued with great learning and ability by counsel, and although the discussion has taken a wide range, it has left for determination but two inquiries: 1st. Was the contract sued upon made in this State? 2nd. Is the statute upon which the defense is founded a regulation of commerce obnoxious to the constitutional grant of the power over that subject conferred upon Congress? In regard to the first of these questions, it will be noticed that the provision of the statute upon which reliance is had for the avoidance of the defendant's liability for the sum found due from him to the plaintiff limits its penalty to "con-

tracts made in this State after the first day of January, 1894." This contract was made, it is admitted, after that date. What was the locality of its execution? It did not become a contract until all the parties executed it. By its express provision, it was not to be valid until countersigned by the agent of the plaintiff at Lansing and approved at Akron, Ohio. This latter requisite—the approval of the plaintiff—is the crowning act of its consummation, as expressing the agreement of the parties. It therefore was not made until by plaintiff's approval it was perfected and adopted. Until then it was an imperfect obligation, having no force whatever. The act which gave it vitality was performed outside of the State of Michigan—*i. e.*, in the State of Ohio. It seems clear, therefore, that it was not a contract made in this State within the prohibition of the statute. The question of construction of the language
29 of the statute is analogous *of* that arising upon the alien labor acts, which have been the subject of much discussion in the Federal courts. In cases founded on those acts a vital element of the offense is the making of a contract in a foreign country with a non-resident alien previous to the immigration or importation of such alien into the United States to perform labor or service in this country, and in pursuance of which such non-resident alien comes to the United States and enters upon the performance of the contract. There, as here, the character of the act is made to depend upon the locality of the execution of the prohibited contract. It is perfectly lawful, notwithstanding the alien labor acts, to contract with an alien within the jurisdiction of the United States.

U. S. *v.* Craig, 28 F. R., 795, 799.
U. S. *v.* Edgar, 45 F. R., 44.
S. C. on Error, 48 F. R., 91.

Thus in the Michigan statute no penalty is directed against the execution of a contract outside of the State by a corporation which has not complied with the provisions of the acts of 1891 and 1893. The inquiry, therefore, is not by what law the contract is to be construed—whether that of the place of its execution or that of its performance—or of the form in which suit may be brought upon it. The single question is, Where was it executed? And upon the admitted facts of this case, evidenced by the stipulation, the concessions of counsel, and the fair construction of the clause "and approved at Akron," but one answer can be given to this inquiry. It became the contract of the parties at Akron, Ohio, and was not made in the State of Michigan, within either the language or the spirit of the act of the legislature pleading in defense.
30 Giving to the language of the act its natural and obvious meaning, the phrase "made in the State of Michigan" can have but one interpretation, and must be held to designate contracts there perfected by the assent of all parties. It is not necessary to invoke the rule that a penal act is to be strictly construed, for the language employed has excluded all doubt of the intent of the legislature. The contract sued upon is not avoided by the act of 1893.

2. Upon the second question, as to the constitutionality of the State statute, there is, in my judgment, as little doubt as upon the first. By the contract sued upon the defendant "is hereby authorized to sell Buckeye mowers, reapers, and binders and extra parts thereof in the following territories, viz: Laingsburg and vicinity and Elsie and vicinity, including the townships of Washington and Elba, in Gratiot county, and Chapin, in Saginaw county, and the west half of Fairfield, in Shiawassee county, for and during the season of 1894." * * *

The defendant, therefore, was not a resident local agent of the plaintiff, and, although selling on commission, was really, as the contract contemplates, nothing more than an itinerant vendor in the territory specified. The fact that the company had a warehouse at Lansing, where it stored its implements and the necessary "repairs" or parts of the machines which it manufactured and sent here for sale, in order that it might meet the demands of those having its machines to supply such repairs or parts, is immaterial in this case. Without doubt, property so stored and kept within the State of Michigan for the convenience of the company and
31 the promotion of its business in affording facilities to its customers for the purchase and repair of the implements which it manufactured and sold, unless these were merely in transit for delivery to customers here, would authorize the State to tax such property for the protection it received. But the right to taxation of such property is not in question here. The State statute really imposes a tax upon the corporations included within its provisions for the privilege of selling their wares in Michigan, and therefore is obviously a tax upon interstate commerce within the provisions of the Federal Constitution and the decisions of the Supreme Court of the United States. It is equally so regarded by the supreme court of the State; and in Coit *v.* Sutton, decided in October, 1884, the supreme court of the State of Michigan, in passing upon this very statute, so decided, holding that it imposed a tax "upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid, which if enforced would embarrass plaintiff in its commerce with non-inhabitants of Michigan. It must therefore be held that the act in question does not apply to foreign corporations, whose business within this State consists merely of selling through itinerant agents and delivering commodities manufactured outside of this State." The opinion cites many decisions of the Supreme Court of the United States upon the construction of the commerce clause of the Constitution, which all sustain this conclusion. In addition to these, the cases of—

Crutcher *v.* Kentucky, 141 U. S., 147;
Brennan *v.* Titusville, 153 U. S.. 289, and
Covington Bridge Co. *v.* Kentucky, 154 U. S., 204,

32 in which cases the opinions of the court are delivered respectively by Mr. Justice Bradley, Mr. Justice Brewer, and Mr. Justice Brown, review fully the authorities upon this question and render unnecessary any lengthy discussion of the question upon prin-

ciples. The fact that the act of 1893, the Laws of '93, page 82, does not discriminate against foreign corporations does not exempt it from the charge of being an interference with interstate commerce. This point is so fully discussed in several of the cases cited *supra* that it need not here be elaborated. Indeed, the decision of the supreme court of the State of Michigan leaves nothing to be said in support of the statute as applied to this case. There is nothing in the stipulation of facts which takes the case outside of the effect of that decision.

The judgment must be entered for the plaintiff for the sum of $5,052.56, with interest, at six per cent., from November 3rd, 1894.

(Signed) HENRY H. SWAN,
District Judge.

33 *Exceptions.*

United States Circuit Court, Sixth Circuit and Eastern District of Michigan.

AULTMAN, MILLER & COMPANY, Plaintiff,
vs.
WILLIAM HOLDER, Defendant. } No. 8044.

Dated NOVEMBER 25, 1895.

Now comes the said defendant, by Wood & Wood, his attorney-, and excepts to the special findings and decisions of the court heretofore made and filed in this cause.

First. To the first conclusion of law.

Second. To the second conclusion of law.

Third. To the third conclusion of law.

Fourth. Said defendant says that the findings of fact do not support the conclusions of law.

WOOD & WOOD,
Attorney- for Defendant.

Filed in clerk's office November 27, 1895.
WALTER S. HARSHA, *Clerk.*

WOOD & WOOD,
Attorneys for Defendant.

34 *Special Findings.*

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

AULTMAN, MILLER AND COMPANY, Plaintiff,
vs.
WILLIAM HOLDER, Defendants.

Special findings.

At a session of the said court held on the third day of November,

1894, the issue joined in this cause came on for trial before the Hon. Henry H. Swan, district judge, without a jury, the parties having signed a written stipulation waiving a jury trial, and thereupon said issue was duly tried, argued, and submitted to said district judge, and he was requested by the parties to make a written finding of the facts and law; and afterwards, to wit, on the 13th day of May, 1895, the said district judge announced his conclusions in the case in a written opinion duly filed, reserving the right to make and file a special finding of the facts and the law, if the parties or either of them so desired.

And afterwards, to wit, on this the 3rd day of November, 1895, the said district judge, at the request of said defendant, makes and files the following special findings:

Findings of Facts.

First. On the 29th day of April, 1894, the parties of this suit entered into a written contract, a copy of which, marked "copy of contract," is hereinafter set forth. Said contract was executed, accepted, and was approved, as set forth in said contract and
35 in the endorsement on the back thereof.

Second. The provisions of said contract, in so far as plaintiff is concerned, have been fulfilled.

Third. There is a balance due the plaintiff from the defendant under said contract of five thousand and fifty-two and fifty-six*th* hundredths dollars ($5,052.56).

Fourth. Aultman, Miller & Company is a corporation organized and existing under the general laws of Ohio, having its corporation office in the city *in the* of Akron, county of Summit and State of Ohio, and having its manufactory at the same place.

Fifth. Aultman, Miller & Company do not manufacture any goods whatever within the State of Michigan.

Sixth. Aultman, Miller & Co. sells its goods in Michigan by means of local commission agents, and it has a general agent at the city of Lansing, in Michigan, and its commission agent- are under similar contracts with the plaintiff to the one set forth in this action.

Seventh. All contracts are sent to Aultman, Miller & Company, at Akron, for approval or rejection before taking any effect.

Eighth. The goods sold by Aultman, Miller & Company in the State of Michigan and manufactured at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agents, forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent or in bulk to Lansing or various points throughout the State and reshipped in smaller lots direct to the commission agent.

Ninth. Aultman, Miller & Co. own a warehouse in the city of Lansing for the transfer of such reshipments for the tempo-
36 rary storage of a small stock of extras or repairs which experience has shown may be suddenly needed by customers

throughout the State during the harvest season. A portion of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of their customers. These are partially commission goods and partially goods sold direct to them.

Tenth. Accounts with every commission agent in the State of Michigan are kept at the office of the plaintiff in Akron, Ohio.

Eleventh. The plaintiff effects settlement with its commission agents by sending to its general agent copies or statements of all such accounts. The general agent and assistant check over the season's work with the commission agent, collect pay for the machines sold in notes or cash or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and the notes so taken are subject to the approval or rejection of the plaintiff.

Twelfth. All notes taken by the commission agents of Aultman, Miller & Company are sent through its general agent at Lansing to the factory at Akron, Ohio, where they are numbered, recorded, filed, and retained until just before maturity, when they are sent direct to the bank or express companies for collection and remittance direct to Akron, Ohio.

Thirteenth. Aultman, Miller & Company has never filed a copy of its articles of association in the office of the secretary of state of the State of Michigan or in any other office in Michigan, nor has said company ever paid any franchise fee to the State of Michigan or in any way complied or attempted to comply with section one of
37 an act of the Michigan legislature entitled "An act to provide for the payment of the franchise fee by corporation-," approved July 2, 1891, as amended by act No. 79 of the public acts of Michigan of 1893, approved May 13, 1893 (Public Acts 1891, p. 240; Public Acts 1893, p. 82), and which said section one, as amended, reads as follows:

SECTION 1. The people of the State of Michigan enact, That every corporation or association hereafter incorporated or formed by consolidation or otherwise by or under any general special law of this State which is required by law to file articles of association with the secretary of state and every foreign corporatopn or association which shall hereafter be permitted to transact business in this State which shall not prior to the passage of this act have filed or recorded its articles of association under the laws of this State, and been thereby authorized to do business therein, shall pay to the secretary of state a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof, and that every corporation heretofore organized or doing business in this State which shall hereafter increase the amount of its authorized capital stock shall pay a franchise fee on one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or associatioh and a proportionate fee upon any and each subsequent increase thereof: Provided that the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars, and in case any corporation or association hereafter in-

corporated under the law on this State, or foreign corporation authorized to do business in this State, has no authorized capital stock, then in such case each and every corporation or association so oncorporated or doing business on this State shall pay a franchise fee of five dollars.

All contracts made in this State after the first day of January, eighteen hundred and ninety-four, by any corporation which has not first complied with the provision- of this act shall be wholly void."

Copy of Contract.

This agreement, made this 20th day of February A. D. 1894 between Aultman, Miller & Co. a corporation duly incorporated under the laws of the State of Ohio, of Akron Ohio of the first part and William Holder of Laingsburg, county of Shiawassee, and State of Michigan of the second part witnesseth, That the party of the second part is hereby authorized to sell Buckeye mower-, reapers and binders and extra parts thereof in the following territory, viz: Laingsburg and vicinity and Elsie & vicinity including the township of Washington and Elba in Gratiot county, Chapin in Saginaw county and the west half of Fairfield in Shiawassee Co., for and during the season of 1894 on the following terms and conditions viz. The party of the second part agrees:

First. To use all reasonable diligence in canvassing and supplying said territory with said machines and in maintaining their reputation in preference to any other kind of mower and combined mowing and reaping machines and harvesters and binders and not to canvass or solicit orders outside of the above territory.

Second. To sell the said machines at the retail list prices authorized by said first party with freight and charges from Laingsburg added thereto, on the following terms, viz: One-half, October 1, 1894, one-half October 1, 1895. In extreme cases one-third October 1, 1894, one-third October 1, 1895, one-third October 1, 1896, shall be allowed on binders only for which settlement must be made with the purchaser on the delivery of machines, and to grant credit to such persons only as are of well-known responsibility and of good reputation for the payment of their debts, to see that all notes taken for machines sold are drawn on blanks furnished by the said first party and signed by one or more persons of well-known responsibility and in all cases of doubt as to the responsibility of the purchaser to require a mortgage on property real or personal ample sufficient to secure a payment in full of all such notes, all notes to bear interest as specified in the blanks provided by first party and in no instance to run beyond the time above mentioned. And if at any time the party of the first part shall learn that any of the said notes were not signed by persons of well-known responsibility, then the party of the second pary agrees to redeem all such notes with accrued interest, in cash or approved notes at the option of the party of the first part.

Third. To endorse with waiver of protest and notice of non-payment all notes given by renters and parties owning no real estate,

unless sufficiently secured by chattel mortgage or otherwise, and all notes which on examination by a banker or other competent authority, chosen by the first party of its general agent are pronounced not good or insufficiently secured.

Fourth. That all machines and parts of machines and all other goods received on commission under this contract shall be held by the said second party on special storage and deposit as the property of the party of the first part until converted into notes or money, as herein provided, which notes are to be received by said second party and held on special deposit as the property of said Aultman, Miller & Co. until forwarded to said Aultman, Miller & Co. or delivered to their authorized agent.

That in all cases — machines are sold for cash or part cash and notes, *and* such cash received shall be promptly remitted, to Aultman, Miller & Co. Akron Ohio, or their authorized agent, and that any and all sums of money that may in any case become due and owing from said party of the second part to said party of the first part shall be collectible without any relief whatever from valuation or appraisement laws.

41 Fifth. To see that all machines sold are properly set up and started and as far as possible that they give satisfaction to the purchaser and to keep a correct record of sales showing the name and post-office address of each purchaser with price terms and date of sale, said record of sales to be reported to the party of the first part at its request and at all times to be subject to the inspection of its general agent.

Sixth. To receive all machines, extra or other goods shipped or delivered on account of said first party to pay the freight on them, keep them well housed, well cared for, free from taxes and to insure in a reliable company all goods of every nature on hand that belong to *the* Aultman, Miller & Co. with loss or damage on the same made payable to Aultman, Miller & Co. as their interest may appear, at the time of said loss or damage. To keep all unsold goods well housed and cared for, subject to the order of party of the first part until renewal of this contract or if necessary up to May 1, 1895 and in no case making charge for handling or storing the same, ordinary freight charges in all cases to follow machines and extras reshipped, but no express charges shall follow goods reshipped, nor shall the party of the first part in any case be obliged to pay express charges on goods shipped to the party of the second part.

Seventh. In furnishing repairs free of charge to customers, to do so only when there is a flaw or defect in the original and in all cases of repairs so furnished to have on hand the broken or defective pieces to show at settlement and to deliver the same to

42 the party of the first part, otherwise bills of this kind will not be allowed, and in no case whatever to take from any machine belonging to the first party any part thereof, as extras or repairs, to pay at settlement for all machines on hand, in case of a violation of this clause.

Eighth. To make prompt and accurate reports of machines on hand as often as requested by the first party or its general agent,

to promptly execute orders for transfer of machines, if any are on hand unsold and in case of failure to make such report or transfers to pay said first party for all machines remaining on hand at settlement unsold by reason of such failure, at the option of said first party.

Ninth. To sell or assist in the sale of — other mowing machines, or combined mowing and reaping machines or harvesters and binders in said territory during the continuance of this contract and not to purchase, keep in stock, or offer for sale binding twine, knives, sickles, sections, or other parts of the Buckeye machines manufactured and furnished by any other than the first party.

Tenth. To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time.

Eleventh. To publish a notice of this agency in any one or more newspapers in the above-named territory during the months of April, May and June, without charge to the first party hereto. To receive and pay transportation charges on all advertising matter forwarded by said first party and to see that it is properly distributed among the farmers of the above-described territory.

43 The party of the first part further agrees with the party of the second part:

First. To furnish to said second party such machines of the kinds they make as may be wanted to supply said territory, so long as their stock on hand will enable them to fill the orders. No commission will be allowed on orders taken and not filled nor on machines which have for any cause been returned and in no case shall the party of the second part be entitled to a commission on a sale where the machine has not been delivered and properly set up and started to the satisfaction of the purchaser and settled for. Nor shall any commission whatever be due said second party until a full settlement of account is made and that the said *upon* second party be ready to make settlement on demand of the first party or their authorized agent.

Second. To allow said second party as compensation for receiving, handling, storing, selling, setting up and starting machines and making collections whenever required a commission equal to an amount which deducted from the price for which the machines have been sold after deducting other allowances of every nature, will make the net amount to be *returned* by the first party in notes and cash in the same proportion as taken for machines sold as follows:

Freights allowed.	Width of cut.	If sold for cash.	If sold for notes.
Buckeye light mower one horse....	3 ft. 9 in.	32 00	34 00 each
Buckeye light mower	4 ft. 3 in.	33 00	35 00 "
New Buckeye mower.....	4 ft. 6 in.	34 00	36 00 "
New Buckeye mower (t-o combine-).	4 ft. 6 in.		
Buckeye mower.....	5 ft.	35 00	37 00 "
44 Buckeye mower.....	6 *ftte*	40 00	42 00 "
New Buckeye table rake.....	5 feet 2 in.		

New Buckeye dropper	5 feet 2 in.			
Buckeye frameless binder	5 "	90 00	90 00	each
Buckeye frameless binder	6 "	90 00	95 00	"
Buckeye frameless binder	7 "			
Buckeye Banner binder	5 3 3 in.	90 00	95 00	"
Buckeye bundle-carrier for binders		4 50		"
Buckeye flax and clover dump		2 70		"
Buckeye binder truck, two-wheeled		6 75		"

Where an outfit consisting of binder, trucks and bundles carrier is sold to one person the net cash price shall be $95.00 time price $95.00 for 5-ft. machines and $95.00 cash or $100.00 time for 6-ft. machines.

Third. To furnish the said second party a stock of extra casting and other repairs (excepting knives, sickles knife and sickle heels sections rivets guards, canvasses, pitman ferrules, spring keys, brass boxes, chain links, bolts and other net goods), from the prices of which as found in the published price-list a commission of 25 per cent. will be allowed all such extras sold to be paid in cash on demand on the first party *to* their authorized agent.

Fourth. To sell to said second party knives and sickles, and knives and sickle heels guards sections and rivets at discount of 50 per cent., and pitman ferrules, spring keys brass boxes chains links canvasses bolts and other net goods at a discount of 50 per cent., all to be paid for in cash on or before the first day of August, 1894.

45 Fifth. To furnish said second party blank notes orders circulars and posters and such other printed documents as they are accustomed to supply their agents.

NOTICE.—It is especially agreed that when sales have not been closed by cash or notes on or before delivery as stated above, then the party of the first part may send a person to settle with the purchaser of machines, and the party of the second part shall pay all the expenses of making such settlement. It is further agreed that Aultmen, Miller & Co. shall not be held liable under any written or printed warranty given by them on their machines that are allowed to go out without first having been settled for.

No canvassers or expert that may be sent to aid you shall have any authority to make any charge whatever in our contract with you, and all sales made by him will he subject to your approval or rejection as no allowance will be made to you for loss of interest or reduction in price on sales made by him.

Nor will any promise not authorized in writing by our manager at Lansing, Michigan be recognized at settlement and the first party deserves the right to rescind or annul their contract at any time that the said party of the second part shall violate or neglect to fulfill any of the above stipulations.

In witness whereof, the parties *of* hereunto have set their hand this day and date above written.

AULTMAN, MILLER & CO.,
By D. C. GILLETT.

This contract not valid unless countersigned by our manager at Lansing, Mich., and app. at Akron.

WM. HOLDER.

Countersigned, Lansing, Mich., Feb. 27, 1894.
R. H. WORTH, *Manager.*

Across the back of said contract are the words:
46 Approved April 29th, 1894. Ira M. Miller, secretary.

Findings of Law.

On the above and foregoing finding of facts the court finds the following conclusions or findings of law:

1. The business of Aultman, Miller & Co. as carried on under and in pursuance of the said contract is an interstate-commerce business, and said company is not subject to section one of the Michigan franchise-fee act of 1891, as amended by act No 79 of the public act- of Michigan of 1883, and said last-named act is, so far as it applies or purports to apply to foreign corporations like Aultman, Miller & Co., which are doing in Michigan an interstate-commerce business, is in conflict with the provision- of the Constitution of the United States authorizing Congress to regulate commerce with foreign nations and among the several States and with the Indian tribes.

2. Said contract was made and executed in the State of Ohio and is an Ohio contract, and it does not provide for the transaction of any business in Michigan other than an interstate-commerce business, and the plaintiff is therefore within the protection of the Constitution of the United States.

3. Upon the facts found the plaintiff is entitled to recover the sum of $5,052.56, with interest, at six per cent., from Nov. 3, 1894, and a judgment will therefore be entered in favor of the plaintiff and against the defendant for $5,212.56 and costs of suit, to be taxed.

HENRY H. SWAN,
District Judge.

Filed in clerk's office Nov. 2, 1895.
WALTER S. HARSHA, *Clerk.*

47 *Exceptions.*

United States Circuit Court, Sixth Circuit, and Eastern District of Michigan.

AULTMAN, MILLER & COMPANY, Plaintiff,
vs.
WILLIAM HOLDER, Defendant.

Dated AUGUST 23, 1895.

Now comes the said defendant, by Wood & Wood, his attorney-, and excepts to the finding and decision of the court heretofore made

and filed in this cause, and for cause of exceptions alleges that the same was erroneous for the reasons:

1. That the court erred in holding that the contract upon which the action was based was made in the State of Ohio.

2. That the court erred in holding that the defendant was not a resident local agent of the plaintiff, but was an itinerant vender.

3. That the court erred in holding that the statute of the State of Michigan imposes a tax upon the corporation- included within its provision- for the privileges of selling their wares in Michigan, and is therefore a tax upon interstate commerce within the provision- of the Federal Constitution.

4. That the court erred in entering judgment for the plaintiff and against the defenda-t.

WOOD & WOOD,
Attorney- for Defendant.

Filed in clerk's office Oct. 31, 1895.
WALTER S. HARSHA, *Clerk.*

48 *Stipulations of Facts.*

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

AULTMAN, MILLER & COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM HOLDER, Defendant.

To said court:

It is agreed between the parties to the above action that the following facts are agreed upon without submission of evidence, and the parties ask that this stipulation of facts be made a part of the record:

First. It is agreed that the contract referred to between the parties was executed, accepted, and approved as set forth in said contract.

Second. It is agreed that the provision- of the contract, in so far as plaintiff is concerned, have been fulfilled.

Third. It is agreed that the balance due, amounting to five thousand and fifty-two and fifty-six hundredth- dollars ($5,052.56), is correct.

Fourth. It is agreed and admitted that Aultman, Miller & Co. is a corporation organized and existing under the general laws of Ohio, having its corporate office in the city of Akron, county of Summit and State of Ohio, and having its manufactory at the same place.

49 Fifth. It is agreed and admitted that Aultman, Miller & Co. does not manufacture any goods whatever within the State of Michigan.

Sixth. It is agreed that Aultman, Miller & Co. sells its goods by means of local commission agents, and that it has a general agent at the city of Lansing, and that its commission agents are under similar contracts with the plaintiff to the one set forth in this contract.

Seventh. It is agreed and admitted that all contracts are sent Aultman, Miller & Co., at Akron, Ohio, for approval or rejection, before taking any effect.

Eighth. It is agreed and admitted that the goods sold by Aultman, Miller & Co. in the State of Michigan and manufacturers at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agent, forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent or in bulk to Lansing or various points throughout the State and reshipped in smaller lots direct to the commission agent.

Ninth. It is agreed and admitted that Aultman, Miller & Co. own a warehouse in the city of Lansing for transfer of such reshipment, for the temporary storage of a small stock of extras or repairs, which experience has shown may be suddenly needed by customers throughout the State during the harvest season. A portion of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of their customers. These are partially commission goods and partially goods sold direct to them.

Tenth. It is agreed and admitted that accounts with every commission agent in the State of Michigan are kept at the office of the plaintiff in Akron, Ohio.

Eleventh. It is agreed and admitted that the plaintiff effects settlement with its commission agents by sending to its general agent copies or statements of all such accounts; that the general
50 agent and his assistants check over the season's work with the commission agent, collect pay for the machines sold in notes or cash, or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and that the notes so taken are subject to the approval of rejection of the plaintiff.

Twelfth. It is agreed and admitted that all notes taken by the commission agents of Aultman, Miller & Co. are sent through its general agent at Lansing to the factory at Akron, Ohio, where they are numbered, recorded, filed, and retained until just before maturity, when they are sent direct to banks or express companies for collection and remittance direct to Akron, Ohio.

F. A. BAKER,
Attorney for Plaintiff.
WOOD & WOOD,
Attorneys for Defendants.

Filed in clerk's office Nov. 3, 1894.
WALTER S. HARSHA, *Clerk.*

51 *Commission Contract with Aultman, Miller & Co.*

This agreement, made this 20th day of February A. D. 1894 between Aultman, Miller & Company (a corporation duly incorporated under the laws of the State of Ohio) of Akron Ohio of the first part and Wm. Holder of Laingsburg county of Shiawassee, and State of Michigan of the second part, witnesseth, That the party of the second part is hereby authorized to sell Buckeye mowers, reapers and binders and extra parts thereof in the following territory, viz. Laingsburg and vicinity and Elsie and vicinity, including the township of Washington & Elba in Gratiot county, Chapin in Saginaw Co. and the west half of Fairfield in Shiawassee Co. for and during the season of 1894 on the following terms and conditions viz. The party of the second part agrees:

First. To use all reasonable diligence in canvassing and supplying said territory with said machines and in maintaining their reputation in preference to any other kind of mowers and combined mowers and reaping machines and harvesters and binders and not to canvass or solicit orders outside of the above territory.

Second. To sell the said machines at the retail list prices authorized by said first party with freight and charges from Laingsburg added thereto on the following terms viz. One-half October 1, 1894 one-half October 1, 1895. In extreme cases one-third October 1, 1894 one-third October 1, 1895, one-third October 1, 1896, shall be allowed on binders only for which settlement must be made with the purchaser on the delivery of machines, and to grant credit to such persons only as are — well-known responsibility and of good reputation for the payment of their debts to see that all notes taken for machines sold are drawn on blanks furnished by the said first party and signed by one or more persons of well-known responsibility and in all cases of doubt as to the responsibility of the purchaser to require a mortgage on property real or personal, ample sufficient to secure payment in full of all such notes all notes to bear interest as
52 specified in the blanks provided by first party and in no instance to run beyond the time above mentioned. And if at any time the party of the first part shall learn that any of said notes were not signed by persons of well-known responsibility then the party of the second part agrees to redeem all such notes with accrued interest in cash or approved notes at the option of the party of the first part.

Third. To endorse with waiver of protest and notice of non-payment, all notes given by renters and parties owning no real estate, unless sufficiently secured by chattel mortgage or otherwise, and all notes which on examination by bankers or other competent authority, chosen by the first party or its general agent are pronounced not good or insufficiently secured.

Fourth. That all machines and parts of machines and all other goods received on commission under this contract shall be held by the said second party on special storage and deposit as the property of the party of the first part, until converted into notes or money, as herein provided, which notes are to be received by said second

party and held on special deposit as the property of said Aultman Miller & Co. until forwarded to said Aultman, Miller & Co., or delivered to their authorized agent. That in all cases where machines are sold for cash or part cash and notes, all such cash received shall be promptly remitted to Aultman, Miller & Co. Akron Ohio or their authorized agent and that any and all sums of money that may in any case become due and owing from said party of the second part to said party of the first part shall be collected without any relief whatever from valuation or appraisement laws.

Fifth. To see that all machines sold are properly set up and started and as fas as possible that they give satisfaction to the purchaser
53 and to keep a correct record of sales, showing the name and post-office address of each purchaser with price terms and date of sale, said record of sales to be reported to the party of the first part at its request, and at all times to be subject to the inspection of its general agent.

Sixth. To receive all machines, extras or other goods shipped or delivered on acco-nt of said first party to pay the freight on them, keep them well housed well cared for free from taxes and to insure in a reliable company all goods of every nature on hand that belong to Aultman, Miller & Co. with loss or damage on the same made payable to Aultman, Miller & Co. as their interest in said property may appear at the time of said loss or damage. To keep all unsold goods well housed and cared for, subject to the order of the party of the first part until renewal of this contract or if necessary up to May 1, 1895, and in no case making charges for handling or storing the same, ordinary freight charges in all cases to follow machines and extras reshipped but no express charges shall follow goods shipped, nor shall the party of the first part in any case be obliged to pay express charges on goods shipped to the party of the second part.

Seventh. In furnishing repairs free of charge to customers to do so only when there is a flaw or defect in the original and in all cases of repairs so furnished, to have on hand the broken or defective pieces to show at settlement and to deliver the same to the party of the first part, otherwise bills of this kind will not be allowed and in no case whatever to take from any machine belonging to the first party any part thereof, as extras or repairs, to pay at settlement for all machines on hand, in case of a violation of this clause.

54 Eighth. To make prompt and accurate reports of machines on hand as often as requested by the first party or its general agent, to promptly execute orders for transfer of machines, if any are on hand unsold, and in case of failure to make such reports or transfers to pay said first party for all machines remaining on hand at settlement, unsold by reason of such failure at the option of said first party.

Ninth. To sell or assist in the sale of no other mowing machines or combined mowing and reaping machines or harvesters and binders, in said territory during the continuance of this contract and not to purchase keep in stock of offer for sale binding twine, knives, sickles, sections or other parts of the Buckeye machines manufactured and furnished by any other than the first party.

Tenth. To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time.

Eleventh. To publish a notice of this agency in one or more newspapers in the above-named territory during the months of April, May, and June without charge to the first party hereto. To receive and pay transportation charges on all advertising matter forwarded by said first party and to see that it is properly distributed among the farmers of the above-described territory.

The party of the first part further agrees with the party of the second part:

First. To furnish to said second party such machines of the kind they make as may be wanted to supply said territory, so long as their stock on hand will enable them to fill the orders. No commission will be allowed on orders taken and not filled nor on machines which have for any cause been returned and in no case shall the party of the second part be entitled to a commission on a sale where the machine has not been delivered and properly set up and started to the satisfaction of the purchaser and settled for. Nor shall any commission whatever be due said second party until a full settlement of account is made, and that the said second party be ready to make settlement on demand of the first party or their authorized agent.

Second. To allow said second party a compensation for receiving handling, storing, selling, setting up, and starting machines, and making collections whenever required, a commission equal to an amount which deducted from the price for which the machines have been sold after deducting other allowances of every nature, will make the net amount to be retained by the said first party in notes and cash in the same proportion as taken for machines sold as follows:

Freight allowed.	Width of cut.	If sold for cash.	If sold for notes.
Buckeye light mower (one horse)	3 ft. 9 in.	32 00	34 00 "
Buckeye light mower	4 " 3 "	33 00	35 00 "
New Buckeye mower	4 " 6 "	34 00	36 00 "
New Buckeye mower (combine-)	4 " 6 "		
Buckeye mower	5 "	35 00	37 00 "
Buckeye mower	6 "	40 00	42 00 "
New Buckeye table rake	5 " 2 in.		
New Buckeye dropper	5 " 2 "		
Buckeye frameless binder	5 "	90 00	90 00 "
Buckeye frameless binder	6 "	90 00	95 00 "
Buckeye frameless binder	7 "		
Buckeye Banner binder	5 " 3 in.	90 00	95 00 "
Buckeye bundle-carrier for binder		4 50	
Buckeye flax and clover dump		2 70	
Buckeye binder truck, two-wheeled		6 75	

Where an outfit consisting of binder, trucks, & bundle-carrier is sold to one person, the net cash price shall be $95.00. Time price

$95.00 for 5-ft. machines and $95.00 cash or $100.00 time for 6-ft. machines.

56 Third. To furnish the said second party a stock of extra castings and other repairs (excepting knives, sickles, knife and sickle heels, sections, rivets, guards, canvasses pitman ferrules spring keys, brass boxes chain links, bolts and other net goods), from the prices of which as found in the published prices-list a commission of 25 per cent. will be allowed all such extras sold to be paid for in cash on demand of the first party or their authorized agent.

Fourth. To sell to said second party knives and sickles and knife and sickle heels, guards, sections and rivets at a discount of 50 per cent. and pitman ferrules spring keys brass boxes chain links canvasses bolts and other net goods at a discount of 50 per cent. all to be paid for in cash on or before the first day of August 1894.

Fifth. To furnish said second party blank notes, orders, circulars, and posters and such other printed documents as they are accustomed to supply their agents.

NOTICE.—It is especially agreed that when sales have not been closed by cash or notes on or before delivery as stated above then the party of the first part may send a person to settle with the purchasers of machines and the party of the second part shall pay all the expenses of making such settlement. It is further agreed that Aultman, Miller & Co. shall not be held liable under any written or printed warranty given by them on their machines that are allowe*w* to go out without first having been settled for.

No canvassers or expert that may be sent to aid you shall have any authority to make any change whatever in our contract with you, and all sales made by him will be subject to your approval or rejection as no allowance will be made to you for loss of interest or reduction in price on sales made by him; nor will any promise not authorized in writing by our manager at Lansing Mich. be recognized at settlement and the first party reserves the right to rescind or annul this contract at any time that the said party of the second part shall violate or neglect to fulfill any of the above stipulations.

57 In witness whereof, the parties hereunto have set their hands the day and date above written.

AULTMAN, MILLER & CO.,
By D. C. GILLETT.

This contract not valid unless countersigned by our manager at Lansing, Mich., and approved at Akron, Ohio.

WM. HOLDER.

R. H. WORTH, *Manager.*

For the sum of one dollar to me in hand paid and for other and valuable consideration, the receipt of which from Aultman, Miller & Co. is hereby acknowledged, I hereby guarantee to them the faithful performance of the within contract, and acknowledge myself personally bound for the payment on demand of all obligations

arising under said contract on the part of the said party of the second part.

Dated —— —, 1894.

—— ——.

Witness:

—— ——.

Special Notice to General Agents.—Make all contracts in triplicate. Mail the original to the home office, leave one copy with the local agent, and retain one copy for your files.

58 *Names of Individual Copartners.*

....

.....

Order for Printed Matter.

In ordering printed matter, if only English print is wanted write the word- all in proper blank. If other kinds are wanted, fill blanks with fractions. For example, ½ English, ¼ German, ⅛ Swedish, ⅛ Bohemian.

All English.	Bohemian.
German.	Spanish.
Norwegian.	Swedish.

Supply (see note below) "A."

NOTE.—In class-fying agencies for the purpose of enabling the home office to decide how large a supply of print should be sent, the general agent should consider not merely the extent and character of the territory, but also the activity of the agents and their appreciation of the value of printed matter well distributed. Mark the supply as follows:

"A" very large, "B" large, "C" medium, "D" small, "E" very small.

59 Duplicate.

1894.

Wm. Holder; P. O., Laingsburg, Shiawassee county, State of Michigan; February 20th, 1894.

Commission contract with Aultman, Miller & Co., Akron, Ohio.

Freight station, Laingsburg; express office, do.

Fill out the order for printed matter on the back of contract.

General agent, D. C. Gillett.
File all blanks.
Approved April 27th, 1894.

IRA MILLER, *Sec.*

60 *Petition for Writ of Error.*

UNITED STATES OF AMERICA:

In the Supreme Court.

AULTMAN, MILLER & COMPANY, Plaintiff,
vs.
WILLIAM HOLDER, Defendant.

To the supreme court:

Your petitioner, William Holder, of Lansing, Michigan, respectfully shows to the court that he is the same person who is named as defendant in the above-entitled cause in a suit lately prosecuted again- him by the above-named plaintiff in the circuit court of the United States for the sixth circuit and eastern district of Michigan; that such proceedings were had in said cause that on the second day of November, 1895, a judgment was duly entered in said court in favor of the said plaintiff and against your petitioner for the sum of five thousand fifty-two and $\frac{56}{100}$ dollars, with interest at six per cent. from November 3, 1894, together with costs of the plaintiff, to be taxed. Upon the trial of the said cause plaintiff relied upon a certain contract made between the plaintiff and the defendant, and your petitioner, while admitting the contract, claimed that the same was void for the reason that the plaintiff had not complied with the provisions of act number 79 of the public acts of the State of Michigan, entitled "An act to amend section one of number 182 of the public acts of 1891, entitled 'An act to provide for the payment of a franchise fee by corporations, approved July 2, 1891,' approved May 13, 1893;" and the said plaintiff, while admitting that it had not complied with said act, contended that said act was invalid, as in contrevention of the Constitution of the United States relating to commerce between the several States.

61 Your petitioner further shows that the judgment of said court was against the validity of the said statute, on the ground that the same was in contravention of the Constitution of the United States relating to commerce between the several States. A copy of the special findings of the judge who tried the cause is hereto annexed, marked "A"; also a copy of the declaration and of the plea in said cause, marked respectively "B" and "C"; and you- petitioner, feeling aggrieved by the said special findings and judgment, has duly excepted thereto, and desires to have the same reviewed on the writ of error by the Supreme Court of the United States.

Wherefore he prays that a writ of error may issue to the said circuit court of the United States for the sixth circuit and eastern district of Michigan in accordance with the rules and practice of the court in such cases.

And your petitioner will ever pray, etc.

WILLIAM HOLDER.

WOOD & WOOD,
Att'ys for Defendant.

62 STATE OF MICHIGAN, } ss:
County of Ingham, }

On this 25th day of November, 1895, before me, a notary public in and for the said county of Ingham, personally appeared William Holder, to me known to be the individual who executed the foregoing petition, and then and there acknowledged that he had executed the same.

[Notarial Seal of F. E. Church, Ingham County, Mich.]

F. E. CHURCH,
Notary Public in and for Ingham Co.

STATE OF MICHIGAN, } ss:
County of Ingham, }

William Holder, being duly sworn, deposes and says that he is the above-named petitioner, and that the foregoing petition is true to his own knowledge except as to matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

WILLIAM HOLDER.

Subscribed ans sworn to before me this 25th day of November, A. D. 1895.

[Notarial Seal of F. E. Church, Ingham County, Mich.]

F. E. CHURCH,
Notary Public in & for Ingham Co., Mich.

63 "B."

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

EASTERN DISTRICT OF MICHIGAN, ss:

Aultman, Miller & Co., a manufacturing corporation organized and existing under the laws of the State of Ohio, and who is a citizen of the State of Ohio, by Fred. A. Baker, its attorney, complains of William Holder, a resident of the village of Laingsburg, in the county of Shiawassee, in the eastern district of Michigan, and who is a citizen of the State of Michigan, the defendant herein, in a plea of trespass on the case upon promises, filing this declaration as commencement of suit, etc.

For that whereas, heretofore, to wit, on the 1st day of January, 1894, the said plaintiff was a corporation organized under the laws of the State of Ohio for the purpose on engaging in the business of manufacturing agricultural implements and machinery, with its manufacturing establishment and its office for doing business located at the city of Akron, in the county of Summit, in the State of Ohio, and the authorized and actual capital stock of said corporation being

one million of dollars, to wit, at the city of Lansing, in said eastern district of Michigan;

And whereas, afterwards, to wit, on the 27th day of February, at the said village of Laingsburg and at the city of Lansing, in the eastern district of Michigan, the said plaintiff, by D. C. Gillett and R. H. Worth, its duly authorized agents, entered into a written contract with the defendant, William Holder, in the words and figures following—that is to say:

64 This agreement, made this 20th day of February A. D. 1894, between Aultman, Miller & Co., (a corporation duly incorporated under the laws of the State of Ohio), of Akron, Ohio, of the first part, and William Holder of Laingsburg, county of Shiawassee and State of Michigan, of the second part, witnesseth: That the party of the second part is hereby authorized to sell Buckeye mowers, reapers and binders, and extra parts thereof, in the following territory, viz: Laingsburg and vicinity and Elsie and vicinity including the townships of Washington & Elba in Gratiot county, Chapin in Saginaw county and the west half of Fairfield in Shiawassee county for and during the season of 1894, on the following terms and conditions, viz: The party of the second part agrees:

First. To use all reasonable diligence in canvassing and supplying said territory with said machines, and in maintaining their reputation in preference to any other kind of mowers and combined mowing and reaping machines, and harvesters and binders, and not to canvass or solicit orders outside of the above territory.

Second. To sell the said machine at the retail price-list authorized by said first party, with freight and charges from Laingsburg added thereto, on the following terms, viz: One-half October 1, 1894 one-half October 1st, 1895. In extreme — one-third October 1, 1894, one-third October 1, 1895, one-third October 1, 1896, shall be allowed on binders only, for which settlement must be made with the purchaser on the delivery of machines; and to grant credit to such persons only as are of well-known responsibility and of good reputation for the payment of their debts; to see that all notes taken for machines sold are drawn on blanks furnished by the said first party, and signed by one or more persons of well-known responsibility; and in all cases of doubt as to the responsibility of the purchaser, to require a mortgage on property, real or personal, amply sufficient to secure a payment in full of all such notes; all notes to bear interest as
65 specified in the blanks provided by first party, and in no instance to run beyond the time above mentioned. And if at any time the party of the first part shall learn that any of the said notes were not signed by persons of well-known responsibility, then the party of the second part agrees to redeem all such notes with accrued interest, in cash or approved notes at the option of the party of the first part.

Third. To endorse with waiver of protest and notice of non-payment, all notes given by renters, and parties owning no real estate, unless sufficiently secured by chattel mortgage or otherwise, and all notes which on examination by banker, or other competent au-

thority, chosen by the first party or its general agent, are pronounced not good or insufficiently secured.

Fourth. That all machines and parts of machines, and all other goods received on commission under this contract, shall be held by the said second party on special storage and deposit as the property of the party of the first part, until converted into notes or money, as herein provided, which notes are to be received by said second party and held on special deposit as the property of said Aultman, Miller & Co., until forwarded to said Aultman, Miller & Co., or delivered to their authorized agent. That in all cases where machines are sold for cash or part cash and notes, all such cash received shall be promptly remitted to Aultman, Miller & Co., Akron, Ohio, or their authorized agent, and that any and all sums of money that may in any case become due and owing from said party of the second part, to the said party of the first part, shall be collectable without any relief whatever from valuation or appraisement laws.

66 Fifth. To see that all machines sold are properly set up and started, and, as far as possible, that they give satisfaction to the purchaser; and to keep a correct record of sales, showing the name and post-office address of each purchaser, with price, terms and date of sale; said record of sales to be reported to the party of the first part at its request, and at all times to be subject to the inspection of its general agent.

Sixth. To receive all machines, extras or other goods shipped or delivered on account of said first party; to pay the freight on them, keep them well housed, well cared for, free from taxes, and to insure in a reliable company all goods of every nature on hand that belong to Aultman, Miller & Co., with loss or damage on the same made payable to Aultman, Miller & Co., as their interest in said property may appear, at the time of said loss or damage. To keep all unsold goods well housed and cared for, subject to the order of party of the first part until renewal of this contract, or if necessary up to May 1, 1895, and in no case making charge for handling or storing the same; ordinary freight charges in all cases to follow machines and extras reshipped; but no express charges shall follow goods reshipped, nor shall the party of the first part in any case be obliged to pay express charges on goods shipped to the party of the second part.

Seventh. In furnishing repairs free of charge to customers, to do so only when there is a flaw or defect in the original, and in all cases of repairs so furnished, to have on hand the broken or defective pieces to show at settlement, and to deliver the same to the party of the first part, otherwise bills of this kind will not be allowed; and in no case whatever to take from any machine belonging to the first party any part thereof as extras or repairs; to pay at settlement for all machines on hand, in case of a violation of this clause.

67 Eighth. To make — and accurate reports of machines on hand as often — requested by the first party or its general agent; to promptly execute orders for transfer of machines, if any are on hand unsold; and in case of failure to make such reports or transfers, to pay said first party for all machines remaining on hand at

settlement, unsold by reason of such failure, at the option of said first party.

Ninth. To sell or assist in the sale of no other mowing machines, or combined mowing and reaping machines, or harvesters and binders, in said territory, during the continuance of this contract, and not to purchase, keep in stock or offer for sale binding twine, knives, sickles, sections, or other parts of the Buckeye machines manufactured and furnished by any other than the first party.

Tenth. To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time.

Eleventh. To publish a notice of this agency in any one or more newspapers in the above-named territory during the months of April May and June, without charge to the first party hereto. To receive and pay transportation charges on all advertising matter forwarded by said first party, and to see that it is properly distributed among the farmers of the above-described territory.

The party of the first part further agrees with the party of the second part:

First. To furnish said second party such machines of the kind they make as may be wanted to supply said territory, so long as their stock on hand will enable them to fill the orders. No commission will be allowed on orders taken and not filled nor
68 on machines which have for any cause been returned, and in no case shall the party of the second part be entitled to a commission on a sale where the machine has not been delivered and properly set up and started to the satisfaction of the purchaser and settled for. Nor shall any commission whatever, be due said second party until a full settlement of account is made; and that the said second party be ready to make settlement on demand of the first party or their authorized agent.

Second. To allow said second party as compensation for receiving, handling, storing, selling, setting up and starting machines, and making collections, whenever required, a commission equal to an amount which, deducted from the price for which the machines have been sold, after deducting other allowances of every nature, will make the net amount to be retained by the said first party in notes and cash in the same proportion as taken for machines sold as follows:

Freights allowed.	Width of cut.	If sold for cash.	If sold for notes.
Buckeye light mower (one horse)....	3 ft. 9 in.	$32 00	$34 00
Buckeye light mower	4 " 3 in.	33 00	35 00
New Buckeye mower.....	4 " 6 in.	34 00	36 00
New Buckeye mower (t-o combine-).	4 " 6 in.		
Buckeye mower	5 "	35 00	37 00
Buckeye mower.....	6 "	40 00	42 00
New Buckeye table rake	5 " 2 in.		
New Buckeye dropper.....	5 " 2 in.		
Buckeye frameless binder	5 "	90 00	90 00
Buckeye frameless binder.....	6 "	90 00	95 00
Buckeye frameless binder.....	7 "		

Buckeye Banner binder	5 ft. 3 in.	90 00	950 00	
Buckeye bundle-carrier for binder.....		4 50		
69 Buckeye flax and clover dump.....		2 70		each
Buckeye binder truck, two-wheeled....		6 75		"

Where an outfit consisting of binder, trucks, and bundle-carrier is sold to one person the net cash price shall be $95.00. Time price $95.00 for 5-ft. machines and $95.00 cash or $100.00 time for 6-ft. machines.

Third. To furnish the said second party a stock of extra castings and other repairs (excepting knives, sickles, knife and sickle heels, sections, rivets, guards, canvasses, pitman ferrules, spring keys, brass boxes, chain links, bolts and other net goods), from the prices of which as found in the published price-list, a commission of 25% *per cent.* will be allowed; all such extras sold to be paid for cash on demand of the first party or their authorized agent.

Fourth. To sell to said second party knives and sickles, and knives and sickle heels, guards, sections and rivets, at a discount of 50 per cent., and pitman ferrules, spring keys, brass boxes, chain links, canvasses, bolts and other net goods, at a discount of 50 per cent., all to be paid for in cash on or before the first day of August 1894.

Fifth. To furnish said second party blank notes, orders, circulars and posters, and such other printed documents as they are accustomed to supply their agents.

NOTICE.—It is especially agreed that when sales have not been closed by cash or notes on or before delivery as stated above, then the party of the first part may send a person to settle with the purchasers of machines, and the party of the second part shall pay all the expenses of making such settlements. It is further agreed that Aultman, Miller & Co. shall not be held liable under any written or printed warranty given by them on their machines that are allowed to go out without first having been settled for.

70 No canvasser or expert that may be sent to aid you shall have any authority to make any change whatever in our contract with you, and all sales made by him will be subject to your approval or rejection, as no allowance will be made to you for loss of interest or reduction in price on sales made by him; nor will any promise not authorized in writing by our manager at Lansing, Mich., be recognized at settlement, and the first party reserves the right to rescind or annul this contract at any time that the said party of the second part shall violate or neglect to fulfill any of the above stipulations.

In witness whereof, the parties hereunto have set their hands the day and date above written.

AULTMAN, MILLER & CO.,
By D. C. GILLETT.
WM. HOLDER.

This contract not valid unless countersigned by our manager at Lansing, Mich.

App. at Akron.

Countersigned, Lansing, Mich., Feb. 27, 1894.
R. H. WORTH, *Manager.*

And whereas, afterwards, to wit, on the 27th day of April, 1894, the said written contract was approved by the plaintiff at its office in the city of Akron, in the State of Ohio, and the same then and there became and was a binding and valid contract between the defendant and the plaintiff, according to the terms thereof, to wit, at the city of Lansing, in the eastern district of Michigan.

And the plaintiff avers that it faithfully performed said contract on its part, and between, to wit, the 27th day of February, 1894, and the 1st day of September, 1894, under and in persuance of said contract and at the request of said defendant, it shipped
71 from Akron, Ohio, to said defendant at Laingsburg, Michigan, a large number of Buckeye mowers and reapers and binders and extra parts or repaies for the same, to wit, 100 Buckeye mowers and 100 Buckeye reapers and binders and 200 extra castings, parts, and repairs, all of great value and price, to wit, of the value and price of ten thousand dollars, to wit, at Laingsburg, in the eastern district of Michigan.

And the plaintiff further avers that on and between the dates last aforesaid the said mowers and reapers and binders and the said extras were received by the said defendant under and in pursuance of said contract, and the samme were sold and disposed of by him to divers farmers and customers in the townships named in said contract, and that on, to wit, the first dat of September, 1894, there was due and owing to the plaintiff for and on account of the sales so made by him under said contract a large sum of money, to wit, the sum of five thousand and fifty-two and $\frac{56}{100}$ dollars, and which sum of money the said defendant then and there promised to pay to the plaintiff on demand; yet the said defendant hath disregarded his said promise and hath not, although often requested so to do, paid the said sum money or any part thereof to the plaintiff, to wit, at Laingsburg, in said eastern district of Michigan.

72 "C."

UNITED STATES OF AMERICA:

The Circuit Court *for* the United States for the 6th Circuit and Eastern District of Michigan.

AULTMAN, MILLER & CO. (a Corporation), Plaintiff,
vs.
WILLIAM HOLDER, Defendant.

And now comes defendant, William Holder, by his attorneys, Wood & Wood, and demands a trial of the matters set forth in plaintiff's declaration.

Yours, etc.,

WOOD & WOOD,
Att'ys for Defendant.

To Fred. A. Baker, attorney for plaintiff:

Please to take notice that on the trial of said cause defendant will show, under the general issue above pleaded:

First. That said plaintiff is a foreign corporation, organized and existing under the laws of the State of Ohio, and having its principal and corporate office in the city of Akron, in said State.

Second. That act No. 182 of the laws of Michigan for the year one thousand eight hundred and ninety-one, as amended by act No. 79 of the laws of Michigan for the year one thousand eight hundred and ninety-three, provides that "every foreign corporation or association which shall hereafter be permitted to transact business in this State which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein shall
73 pay to the secretary of state a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association and a proportionate fee upon any and each subsequent increase thereof, and that every corporation heretofore organized or doing business in this State, which shall hereafter increase the amount of its authorized capital stock, shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association and a proportionate fee upon any and each subsequent increase thereof: Provided, that the fee herein povided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorporated under the law of this State or foreign corporation authorized to do business in this State has no authorized capital stock, then in each case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the first day of January, eighteen hundred — ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly void.

This act is ordered to take immediate effect.

Approved May 13, 1893."

Third. That the contract set forth in plaintiff's declaration and upon which right of recovery is based was made and is to be performed in the State of Michigan within the meaning of the said act.

Fourth. That said plaintiff, being a foreign corporation, was at the time of the execution of said contract doing business in the State of Michigan within the meaning and application of said statute.

Fifth. That the plaintiff has not complied with the require-
74 ments of said statute; that neither prior nor subsequent to the passage of said statute has it filed or recorded its articles of association with the secretary of state — the franchise fee of one-half of one mill upon each dollar of its authorized capital stock.

Sixth. That owing to plaintiff's non-compliance with said Michigan statute the said contract is absolutely void and without force as against defendant.

Yours, etc.,

WOOD & WOOD,
Att'ys for Defendant.

75 "A."

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

AULTMAN, MILLER & COMPANY, Plaintiff,
vs.
WILLIAM HOLDER, Defendant.

Special Findings.

At a session of said court held on the 3rd day of November, 1894, the issue joined in this cause came on for trial before the Hon. Henry H. Swan, district judge, without a jury, the parties having signed a written stipulation waiving a jury trial, and thereupon said issue was duly tried, argued, and submitted to said district judge, and he was requested by the parties to make a written finding of the facts and law; and afterwards, to wit, on the 13th day of May, 1895, the said district judge announced his conclusions in the case in a written opinion duly filed, reserving the right to make and file a special finding of the facts and the law, if the parties or either of them so desired.

And afterwards, to wit, on this the 2nd day of November, 1895, the said district judge, at the request of said defendant, makes and files the following special findings:

Finding of Facts.

First. On the 29th day of April, 1894, the parties to this suit entered into a written contract, a copy of which, marked "copy of contract," is hereinafter set forth. Said contract was executed, accepted, and approved, as set forth in said contract and in the
76 endorsement on the back thereof.

Second. The provisions of said contract, in so far as plaintiff is concerned, have been fulfilled.

Third. There is a balance due the plaintiff from defendant under said contract of five thousand and fifty-two and $\frac{56}{100}$ dollars ($5,052.56).

Fourth. Aultman, Miller & Company is a corporation organized and existing under the general laws of Ohio, having its corporate office in the city of Akron, county of Summit and State of Ohio, and having its manufactory at the same place.

Fifth. Aultman, Miller & Company do not manufacture any goods whatever within the State of Michigan.

Sixth. Aultman, Miller & Co. sells its goods in Michigan by means of local commission agents, and it has a general agent at the city of Lansing, in Michigan, and its commission agents are under similar contracts with the plaintiff to the one set forth in this action.

Seventh. All contracts are sent to Aultman, Miller & Co., at Akron, for approval or rejection before taking any effect.

Eighth. The goods sold by Aultman, Miller & Co. in the State of Michigan and manufactured at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agents, forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent or in bulk to Lansing or various points throughout the State and reshipped in smaller lots direct to the commission agent.

Ninth. Aultman, Miller & Co. own a warehouse in the city of Lansing for the transfer of such reshipments, for the temporary storage of a small stock of extras or repairs which experience
77 has shown may be suddenly needed by customers throughout the State during the harvest season. A portion of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of their customers. These are partially commission goods and partially goods sold direct to them.

Tenth. Accounts with every commission agent in the State of Michigan are kept at the office of the plaintiff in Akron, Ohio.

Eleventh. The plaintiff effects settlements with its commission agents by sending to its general agent copies or statements of all such accounts. The general agent and his assistant check over the season- work with the commission agent, collect pay for the machines sold in notes or cash or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and the notes so taken are subject to the approval or rejection of the plaintiff.

Twelfth. All notes taken by the commission agents of Aultman, Miller & Co. are sent through its general agent at Lansing to the factory at Akron, Ohio, where they are numbered, recorded, filed, and retained until just before maturity, when they are sent direct to banks or express companies for collection and remittance direct to Akron, Ohio.

Thirteenth. Aultman, Miller & Company has never filed a copy of its articles of association in the office of the secretary of state of the State of Michigan or in any other office in Michigan, nor has said company ever paid any franchise fee to the State of Michigan or in any way complied or attempted to comply with section one of an act of the Michigan legislature entitled "An act to provide for the payment of the franchise fee by corporations," approved July 2, 1891, as amended by act No. 79 of the public acts of Michigan of 1893, approved May 13, 1893 (Public Acts 1891, p. 240; Public Acts
78 1893, p. 82), and which said section one, as amended, reads as follows:

SECTION 1. The people of the State of Michigan enact, That every corporation or association hereafter incorporated or formed by consolidation or otherwise by or under any general or special law of this State which is required by law to file articles of association with the secretary of state and every foreign corporation or association which shall hereafter be permitted to transact business in this State which shall not prior to the passage of this act have filed or recorded its

articles of association under the laws of this State, and been thereby authorized to do business therein, shall pay to the secretary of state a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof, and that every corporation heretofore organized or doing business in this State which shall hereafter increase the amount of its authorized capital stock shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association and a proportionate fee upon any and each subsequent increase thereof: Provided that the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars, and in case any corporation or association hereafter incorporated under the law of this State, or foreign corporation authorized to do business in this State, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All the contracts made in this State after the first day of January, eighteen hundred and ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly void."

78½ *Copy of Contract.*

This agreement, made this 20th day of February A. D. 1894, between Aultman, Miller & Co., (a corporation duly incorporated under the laws of the State of Ohio) of Akron, Ohio, of the first part, and William Holder of Laingsburg, county of Shiawassee, and State of Michigan, of the second part, witnesseth: That the party of the second part is hereby authorized to sell Buckeye mowers,
79 reapers and binders, and extra parts thereof, in the following territory, viz: Laingsburg and vicinity and Elsie and vicinity, including the townships of Washington and Elba in Gratiot county, Chapin in Saginaw county, and the west half of Fairfield in Shiawassee Co., for and during the season of 1894, on the following terms and conditions, viz: The party of the second part agrees:

First. To use all reasonable diligence in canvassing and supplying said territory with said machines, and in *am*intaining their reputation in preference to any other kind of mowers and combined mowing and reaping machines, and harvesters and binders, and not to canvass or solicit orders outside of the above territory.

Second. To sell the said machine at the retail list prices authorized by said first party, with freight and charges from Laingsburg added thereto, on the following terms, viz: One-half October 1, 1894, one-half October 1, 1895. In extreme cases one-third October 1, 1894, one-third October 1, 1895, one-third October 1, 1896, shall be allowed on binders only, for which settlement must be made with the purchaser on the delivery of machines; and to grant credit to such persons only as are of well-known responsibility and of good reputation for the payment of their debts; to see that all notes taken for machines sold are drawn on blanks furnished by the said first party, and

signed by one or more persons of well-known responsibility; and in all cases of doubt as to the responsibility of the purchaser, to require a mortgage on property, real or personal, amply sufficient to secure a payment in full of all such notes; all notes to bear interest as specified in the blanks provided by first party, and in no instance to run beyond the time above mentioned. And if at any time the party of the first part shall learn that any of the said notes were not signed by persons of well-known responsibility, then the
80 party of the second part agrees to redeem all such notes with accrued interest, in cash or approved notes at the option of the party of the first part.

Third. To endorse with waiver of protest and notice of non-payment, all notes given by renters and parties owning no real estate, unless sufficiently secured by chattel mortgage or otherwise, and all notes which on examination by banker or other competent authority, chosen by the first party or its general agent are pronounced not good or insufficiently secured.

Fourth. That all machines and parts of machines, and all other goods received on commission under this contract shall be held by the said second party on special storage and deposit as the property of the party of the first part until converted into notes or money, as herein provided, which notes are to be received by said second party and held on special deposit as the property of said Aultman, Miller & Co., until forwarded to said Aultman, Miller & Co., or delivered to their authorized agent. That in all cases where machines are sold for cash or part cash and notes, all such cash received shall be promptly remitted to Aultman, Miller & Co., Akron, Ohio, or their authorized agent, and that any and all sums of money that may in any case become due and owing from said party of the second part, to said party of the first part, shall be collectible without any relief whatever, from valuation or appraisement laws.

Fifth. To see that all machines sold are properly set up and started, and, as far as possible, that they give satisfaction to the purchaser; and to keep a correct record of sales, showing the name and post-office address of each purchaser, with price, terms and date of sale said record of sales to be reported to *to* the party of the first part at its request, and at all times to be subject to the inspection of its general agent.

81 Sixth. To receive all machines, extras or other goods shipped or delivered on account of said first party; to pay the freight on them keep them well housed, well cared for, free from taxes, and to insure in a reliable company all goods of every nature on hand that belong to Aultman, Miller & Co., with loss or damage on the same made payable to Aultman, Miller & Co., as their interest in said property may appear, at the time *od* said loss or damage. To keep all unsold goods well housed and cared for, subject to the order of party of the first part until renewal of this contract, or if necessary up to May 1, 1895, and in no case making charge for handling or storing the same; ordinary freight charge in all cases to follow machines and extras reshipped; but no express charges shall follow goods reshipped, nor shall the party of the first part in any case be

obliged to pay express charges on goods shipped to the party of the second part.

Seventh. In furnishing repairs free of charge to customers, to do so only when there is a flaw or defect in the original, and in all cases of repairs so furnished to have on hand the broken or defective piece to show at settlement, and to deliver the same to the party of the first part, otherwise bills of this kind will not be allowed; and in no case whatever, to take from any machine belonging to the first party any part thereof as extras or repairs; to pay at settlement for all machines on hand, in case of a violation of this clause.

Eighth. To make prompt and accurate reports of machines on hand as often as requested by the first party or its general agent; to promptly execute orders for transfer of machines, if any are on hand unsold; and in case of failure to make such reports or transfers to pay sa-d first party for all machines remaining on hand at settlement, unsold by reason of such failure, at the option of said first party.

82 Ninth. To sell or assist in the sale of no other mowing machines, or combined mowing and reaping machines, or harvesters and binders, in said territory, during the continuance of this contract, and not to purchase, keep in stock or offer for sale binding twine, knives, sickles, sections or other parts of the Buckeye machines manufactured and furnished by any other than the first party.

Tenth. To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time.

Eleventh. To publish a notice of this agency in any one or more newspapers in the above-named territory during the months of April May and June, without charge to the first party hereto. To receive and pay transportation charges on all advertising matter forwarded by said first party, and to see that it is properly distributed among the farmers of the above-described territory.

The party of the first part further agrees with the party of the second part:

First. To furnish to said second party such machines of the kinds they make as may be wanted to supply said territory, so long as their stock on hand will enable them to fill the orders. No commission will be allowed on orders taken and not filled nor on machines which have for any cause been returned, and in no case shall the party of the second part be entitled to a commission on a sale where the machine has not been delivered ans properly set up and started to the satisfaction of the purchaser and settled for. Nor shall any commission, whatever, be due said second party until a full settlement of account is made; and that the said second party be ready to make settlement on demand of the first party or their authorized agent.

Second. To allow said second party as compensation for
83 receiving, handling, storing, selling, setting up and starting machines, and making collections, whenever required, a commission equal to an amount which, deducted from the price for

which the machines have been sold, after deducting other allowances of every nature, will make the net amount to be retained by the said first party in notes and cash in the same proportion as taken for machines sold as follows:

	Width of cut.	If sold for cash.	If sold for notes.	
Buckeye light mower	4 feet 3 in.	33 00	35 00	each
Buckeye light mower, one horse	3 " 9 "	32 00	34 00	"
New Buckeye mower	4 " 6 "	34 00	36 00	"
New Buckeye mower (t-o combine-)	4 feet 6 in.			
Buckeye mower	5 feet	35 00	37 00	"
Buckeye mower	6 feet	40 00	42 00	"
New Buckeye table rake	5 feet 2 in.			
New Buckeye dropper	5 feet 2 in.			
Buckeye frameless binder	5 feet	90 00	90 00	"
Buckeye frameless binder	6 feet	90 00	95 00	"
Buckeye frameless binder	7 feet			
Buckeye Banner binder	5 feet 3 in.	90 00	95 00	"
Buckeye bundle-carrier for binder		4 50		"
Buckeye flax and clover dump		2 70		"
Buckeye binder truck, two-wheeled		6 75		"

Where an outfit consisting of binder, trucks and bundle-carrier is sold to one person the net cash price shall be $95.00. Time price $95.00 for 5-ft. machines and $95.00 cash or $100.00 time for 6-ft. machines.

Third. To furnish the said second party a stock of extra castings and other repairs (excepting knives, sickles, knife and sickle heels, sections, rivets, guards, canvasses, pitman, ferrules,
84 spring keys, brass boxes, chain links, bolts and other net goods), from the prices of — as found in the published price-list, a commission of 25% will be allowed; all such extras sold to be paid for in cash on demand of the first party or their authorized agent.

Fourth. To sell to said second party knives and sickles, and knife and sickle heels, guards, sections and rivets, at a discount of 50 per cent., and pitman ferrules, spring keys, brass boxes, chain links, canvasses, bolts and other net goods, at a discount of 50 per cent., all to be paid for in cash on or before the first day of August, 1894.

Fifth. To furnish said second party blank notes, orders, circulars and posters, and such other printed documents as they are accustomed to supply their agents.

NOTICE.—It is especially agreed that when sales have not been closed by cash or notes on or before delivery as stated above, then the party of the first part may send a person to settle with the purchasers of machines, and the party of the second part shall pay all the expenses of making such settlements. It is further agreed that Aultman, Miller & Co., shall not be held liable under any written or printed warranty given by them on their machines that are allowed to go out without first having been settled for.

No canvasser or expert that may be sent to aid you shall have any authority to make any change, whatever, in our contract with you, and all sales made by him will be subject to your approval or rejection, as no allowance will be made to you for loss of interest or reduction in price on sales made by him; nor will any promise not authorized in writing by our manager at Lansing, Mich., be recognized at settlement, and the first party reserves the right to rescind or annul this contract at any time that the said party
85 of the second part shall violate or neglect to fulfill any of the above stipulations.

In witness whereof, the parties hereunto have set their hands the day and date above written.

AULTMAN, MILLER & CO.,
By D. C. GILLETT.
WM. HOLDER.

This contract not valid unless countersigned by [illegible] manager at Lansing, Mich., and app. at Akron.

Countersigned, Lansing, Mich., Feb. 27, 1894.
R. H. WORTH, *Manager.*

Across the back of said contract are the words, "Approved April 29, 1894. Ira M. Milloy, secretary."

86 *Findings of Law.*

On the above and foregoing finding of facts the court finds the following conclusions or findings of law:

1. The business of Aultman, Miller & Co. as carried on under and in pursuance of the said contract is an interstate-commerce business, and said company is not subject to section one of the Michigan franchise-fee act of 1891, as amended by act No 79 of the public acts of Michigan of 1893, and said last-named act is, so far as it applies or purports to apply to foreign corporations like Aultman, Miller & Co., which are doing in Michigan an interstate-commerce business, is in conflict with the provision- of the Constitution of the United States authorizing Congress to regulate commerce with foreign nations and among the several States and with the Indian tribes.

2. Said contract was made and executed in the State of Ohio and is an Ohio contract, and it does not provide for the transaction of any business in Michigan other than an interstate-commerce business, and the plaintiff is therefore within the protection of the Constitution of the United States.

3. Upon the facts found the plaintiff is entitled to recover the sum of $5,052.56, with interest, at six per cent., from Nov. 3, 1894, and a judgment will therefore be entered in favor of the plaintiff and against the defendant for $5,212.56 and costs.

86½ [Endorsed:] United States of America. In the Supreme Court. Aultman, Miller & Company, plaintiff, *vs.* William Holder, defendant. Petition for writ of error. Washington, D. C.,

——, 1895. On filing the within petition in the office of the clerk of the circuit court of the United States for the eastern district of Michigan, let a writ of error issue as therein prayed. H. B. Brown. Wood & Wood, att'ys for petitioner.

87 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

United States Supreme Court.

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Aultman, Miller & Company, a corporatio-, plaintiff, and William Holder, defendant, a manifest error hath happened, to the great damage of the said William Holder, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington, District of Columbia, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of November, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States of America the one hundred and twentieth.

Seal of the Supreme Court of the United States.

88 JAMES H. McKENNEY,
Clerk of the Supreme Court of U. S.

Allowed by—
H. B. BROWN,
Associate Justice.

88½ [Endorsed:] 8044. United States of America. In the Supreme Court. Aultman, Miller & Company, plaintiff, *vs.* William Holder, defendant. Writ of error. Filed in clerk's office Dec. 12, 1899. Walter S. Harsha, clerk. Wood & Wood, att'ys for petitioner.

89 *Bond.*

Know all men by these presents that we, William Holder, of the village of Laingsburg, county of Shiawassee and State of Michigan, as principal, and Percy A. Covert, of the city of Lansing, county of Ingham and State of Michigan, as sureties, are holden and stand firmly bound unto Aultman, Miller & Co., a corporation legally organized and doing business under the laws of the State of Ohio, in the penal sum of seven thousand dollars ($7,000), for the payment whereof, well and truly to be made unto the said Aultman, Miller & Co., their representatives and assigns, we bind ourselves, our representatives and assigns, jointly and severally, firmly by these presents.

Whereas judgment was duly rendered on the 2nd day of November, 1895, in the circuit court of the United States for the sixth circuit and eastern district of Michigan by Henry H. Swan, district judge, in favor of the said Aultman, Miller & Co., plaintiff, for the sum of five thousand two hundred — twelve dollars ($5,212) and costs; and

Whereas the said William Holder has applied for a writ of error for the removal of the said judgment into the Supreme Court of the United States:

Now, therefore, the obligation is such that if the said William Holder shall prosecute this writ of error to effect, and if he fail to make his plea good shall answer all damages and costs that shall be awarded against him, the said William Holder, then this obligation shall be void; otherwise to remain in full force and virtue.

90 In witness whereof the said William Holder and Percy A. Covert have hereunto set their hands and seals this 25th day of November, 1895.

WILLIAM HOLDER. [L. S.]
PERCY A. COVERT. [L. S.]

Signed, sealed, and delivered in presence of—

[Notarial Seal.]

F. E. CHURCH.
WINIFRED SEPLEY.

STATE OF MICHIGAN, }
County of Ingham, } ss:

On this 25th day of November, 1895, before me, a notary public in and for the said county, personally appeared the above-named William Holder, of Laingsburg, Shiawassee county, Michigan, and Percy A. Covert, of Lansing, Ingham county, Michigan, both of whom are to me known to be the individuals described in and who executed the foregoing instrument, and then and there each of them severally acknowledged that he had executed the foregoing bond.

[SEAL.]

F. E. CHURCH,
Notary Public.

I consent to the approval of the above and foregoing bond.

FRED. A. BAKER,
Att'y for Plaintiff.

Detroit, Nov. 27th, 1895.

Approved.
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

Filed in clerk's office Dec. 12, 1895.
WALTER S. HARSHA, *Clerk.*

91 *Citation.*

UNITED STATES OF AMERICA, *ss:*

United States Supreme Court.

To Aultman, Miller & Co., a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, D. C., within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein William Holder is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this twenty-ninth day of November, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States of America the one hundred and twentieth.

HENRY B. BROWN,
Associate Justice.

Service accepted Dec. 10th 1895.

FRED. A. BAKER,
Attorney for Defendant in Error, Aultman, Miller & Co.

91½ [Endorsed:] 8044. United States of America. In the Supreme Court. Aultman, Miller & Company, plaintiff, *vs.* William Holder, defendant. Citation. Filed in clerk's office Dec. 12, 1895. Walter S. Harsha, clerk. Wood & Wood, att'ys for petitioner.

92 *Time to Make Return to Appeal Extended.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjourn-

ment, at the district court-room, in the city of Detroit, on Saturday, the twenty-eighth day of December, in the year one thousand eight hundred and ninety-five.

Present: The Honorable Henry H. Swan, district judge.

AULTMAN, MILLER & COMPANY
v.
WILLIAM HOLDER. } No. 8044.

On the application of the clerk, for cause shown, the time to make return to writ of error is hereby extended twenty days.

93 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Michigan.

AULTMAN, MILLER & COMPANY
v.
WILLIAM HOLDER. } No. 8044.

EASTERN DISTRICT OF MICHIGAN, *ss:*

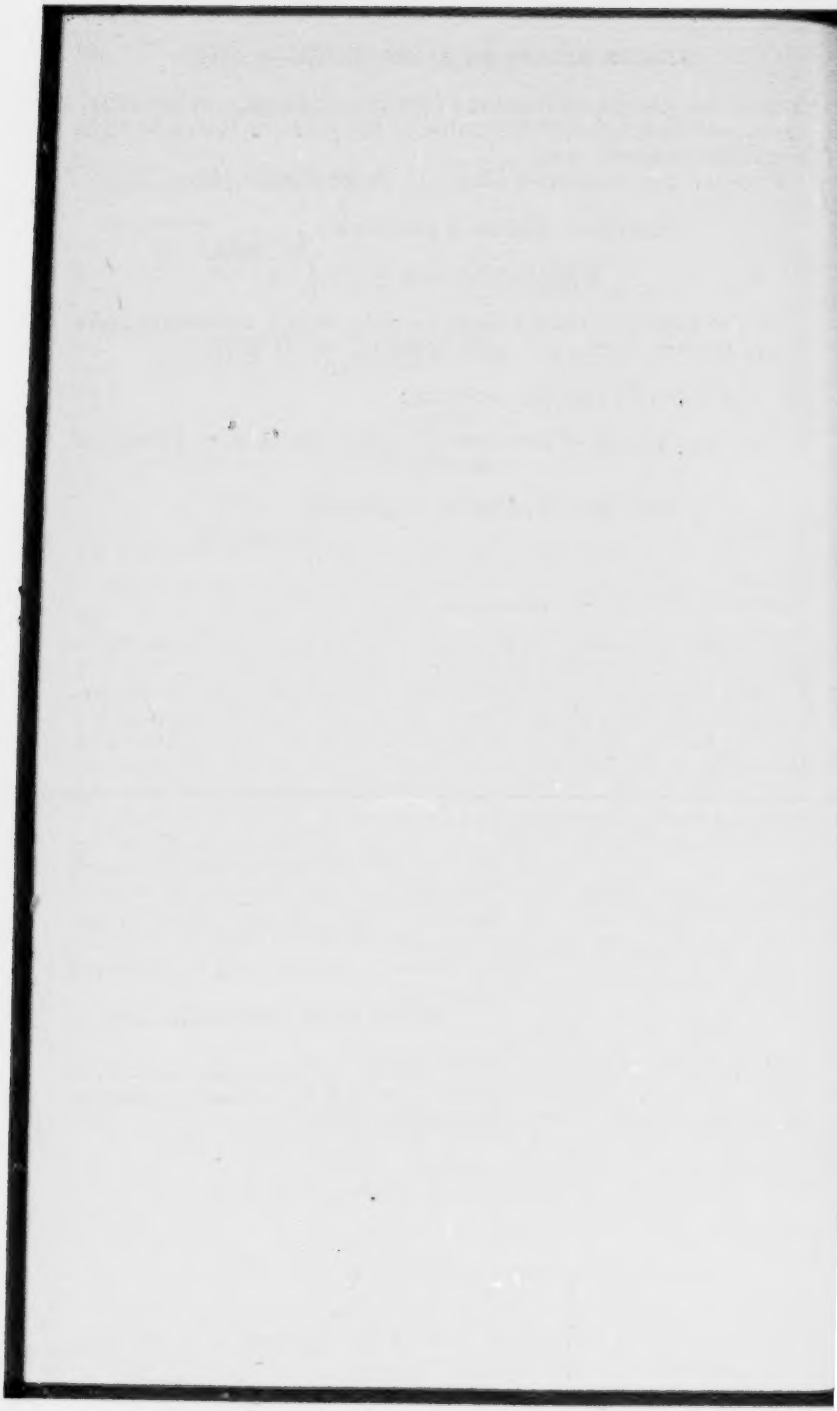
I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writ of error sued out by the above-named defendant to the Supreme Court of the United States that the above and foregoing is a true copy of the record and proceedings in said cause, together with the original petition for writ of error, writ of error, and citation; that I have compared the copies with the original, and they are true and correct transcripts therefrom and of the whole thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 28th day of December, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States of America the one hundred and twentieth.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: Case No. 16,158. E. Michigan C. C. U. S. Term No., 109. William Holder, plaintiff in error, *vs.* Aultman, Miller & Company. Filed January 23, 1896.



Supreme Court of the United States.

WILLIAM HOLDER, Plaintiff in Error,
vs.
AULTMAN, MILLER & Co., Defendants.
} No. 109. October Term, 1897.

It is hereby stipulated and agreed by and between the parties to the above cause, by their respective attorneys, that the contract as printed on pages one to five, inclusive, of the printed record of said cause is incorrect, and that the said contract was drawn, executed, and signed as in the copy printed on pages twenty-six to thirty, inclusive, of the said printed record, and that the said declaration be considered as amended to show a copy of the contract corrected as above.

Dated Aug. 21, 1897.

EDWARD CAHILL,
Attorney for Plaintiff in Error.
FRED. A. BAKER,
Attorney for Defendant in Error.

[Endorsed:] Case No. 16,158. Supreme Court U. S., October term, 1897. Term No., 109. William Holder, pl'ff in error, *vs.* Aultman, Miller & Co. Stipulation of counsel correcting record. Office Supreme Court U. S. Filed Aug. 26, 1897. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

NO. 109.

WILLIAM HOLDER, PLAINTIFF IN ERROR.

VS.

AULTMAN, MILLER & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was brought in the United States Circuit Court for the Sixth Circuit and Eastern District of Michigan, by Aultman, Miller & Co., an Ohio corporation engaged in manufacture of mowers and reapers, against William Holder, one of their local agents, to recover a balance of $5,052.56, claimed to be due it from the said Holder, under his contract with the company.

The defense is that the plaintiff is a foreign corporation and that it has not complied with Act No. 182 of the Laws of Michigan for the year 1891, as amended by Act No. 79 of the Laws of Michigan for 1893, the portion of which that bears on this case reads as follows:

"An Act to provide for the payment of a franchise fee by corporations.

SECTION 1. *The People of the State of Michigan enact*, That every corporation or association hereafter incorporated or formed by consolidation or otherwise, by or under any general or special law of this State, which is required by law to file articles of association with the Secretary of State and every foreign corporation or association which shall hereafter be permitted to transact business in this State, which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein, shall pay to the Secretary of State a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof; and that every corporation heretofore organized or doing business in this State which shall hereafter increase the amount of its authorized capital stock, shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof: Provided, That the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorporated under the law of this State, or foreign corporation authorized to do business in this State has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the first day of January, eighteen hundred ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly ~~paid.~~ void.

SEC. 2. The Secretary of State shall not receive for filing or record the articles of association of any cor-

poration or association unless accompanied by the fee provided for in this act.

Approved July 2, 1891."

That in consequence of these facts the contract is void.

On the part of defendant in error it is admitted that it has not complied with the act in question, but it is claimed that said act is void as a regulation of interstate commerce as applied to this contract. It is also claimed that the contract in question is an Ohio contract, and not within the application of the law.

The case was decided by the court below on an agreed statement of facts, and on the basis of such agreed statement the court made the following findings of facts:

First. On the 29th day of April, 1894, the parties to this suit entered into a written contract, a copy of which, marked "copy of contract," is hereinafter set forth. Said contract was executed, accepted, and approved, as set forth in said contract and in the indorsement on the back thereof.

Second. The provisions of said contract, in so far as plaintiff is concerned, have been fulfilled.

Third. There is a balance due the plaintiff from defendant under said contract of five thousand and fifty-two and fifty-six hnndredths dollars ($5,052.56).

Fourth. Aultman, Miller & Company is a corporation organized and existing under the general laws of Ohio, having its corporate office in the city of Akron, county of Summit and state of Ohio, and having its manufactory at the same place.

Fifth. Aultman, Miller & Company do not manufacture any goods whatever within the state of Michigan.

Sixth. Aultman, Miller & Company sells its goods in Michigan by means of local commission agents, and it has a general agent at the city of Lansing, in Michigan, and its commission agents are under similar con-

tracts with the plaintiff to the one set forth in this action.

Seventh. All contracts are sent to Aultman, Miller & Company, at Akron, for approval or rejection before taking any effect.

Eighth. The goods sold by Aultman, Miller & Company in the State of Michigan and manufactured at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agents, forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent or in bulk to Lansing or various points throughout the State and reshipped in smaller lots direct to the commission agent.

Ninth. Aultman, Miller & Company own a warehouse in the city of Lansing for the transfer of such reshipments, for the temporary storage of a small stock of extras or repairs which experience has shown may be suddenly needed by customers throughout the State during the harvest season. A portion of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of their customers. These are partially commission goods and partially goods sold direct to them.

Tenth. Accounts with every commission agent in the State of Michigan are kept at the office of the plaintiff in Akron, Ohio.

Eleventh. The plaintiff effects settlements with its commission agents by sending to its general agent copies or statements of all such accounts. The general agent and his assistant check over the season work with the commission agent, collect pay for the machines sold in notes or cash or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and the notes so taken are subject to the approval or rejection of the plaintiff.

Twelfth. All notes taken by the commission agents of Aultman, Miller & Co. are sent through its general agent at Lansing to the factory at Akron, Ohio, where they are numbered, recorded, filed and retained until just before maturity, when they are sent direct to banks

or express companies for collection and remittance direct to Akron, Ohio.

Thirteenth. Aultman, Miller & Co. has never filed a copy of its articles of association in the office of the Secretary of State of the State of Michigan, or in any other office in Michigan, nor has said company ever paid any franchise fee to the State of Michigan or in any way complied or attempted to comply with section one of an act of the Michigan legislature entitled "An act to provide for the payment of a franchise fee by corporations," approved July 2, 1891, as amended by act No. 79 of the public acts of Michigan of 1893, approved May 13, 1893 (Public Acts 1891, p. 240; Public Acts 1893, p. 82), and which said section one, as amended, reads as follows: (The act referred to has already been quoted in this statement of the case, and is therefore omitted here.)

The copy of the contract referred to appears at large in the record, and may be briefly summarized as follows:

"This agreement, made this 20th day of February, A. D. 1894, between Aultman, Miller & Co. (a corporation duly incorporated under the laws of the state of Ohio), of Akron, Ohio, of the first part, and William Holder of Laingsburg, county of Shiawassee, and State of Michigan, of the second part, witnesseth; That the party of the second part is hereby authorized to sell Buckeye mowers, reapers, and binders, and extra parts thereof," in Laingsburg and vicinity, and certain other specified territory during the season of 1894. The party of the second part agrees: First, to use all reasonable diligence in canvassing and supplying said territory with said machines. Second, to sell at retail list prices; to grant credit only to persons of responsibility; to use blanks furnished by first party; to require mortgage in case of doubtful responsibility and to redeem all notes not accepted by party of the first part. Third, to endorse notes given by renters and parties owning no

real estate unless sufficiently secured. Fourth, to hold all machines received on commission "on special storage and deposit as the property of the first part until converted into notes or money," these notes then to remain the property of first party, and where machines are sold for cash to promptly remit the cash. Fifth, to see that machines sold are properly set up and started and to keep a record of sales. Sixth, to pay freight on all shipments, keep goods insured, keep all unsold goods housed and cared for, and make no charge for handling or storage. Seventh, to furnish repairs free only in case of flaw or defect. Eighth, to make prompt and accurate reports of machines on hand and unsold, and to promptly transfer such machines at settlement, or in case of failure so to do, to pay for them. Ninth, to sell no other machines. Tenth, "to sell and deliver all machines set up and used as samples or settle for same in cash or approved notes at settlement time." Eleventh, to advertise the agency.

The party of the first part agrees: First, to furnish "to said second party such machines of the kind they make as may be wanted to supply said territory so long as their stock on hand shall enable them to fill their orders," no commission to be due until full settlement of account is made. Second, to allow certain specified commissions as compensation "for receiving, handling, storing, selling, setting up and starting machines and making collections whenever required." Third, to furnish second party a stock of repairs for sale on commission. Fourth, to sell knives, sickles, etc. to the agent at a discountof 50 per cent. Fifth, to furnish second party blank notes and printed matter as required.

A notice which is made a part of the contract provides that a canvasser or expert may be sent to aid in sales, to make settlements or to collect, but that "all

sales made by him will be subject to your (the agents) approval or rejection, nor will any promise not authorized in writing by our manager at Lansing, Michigan, be recognized at settlement."

"In witness whereof the parties hereunto have set their hands the day and date above written.

AULTMAN, MILLER & CO.
By D. C. GILLETT.
WM. HOLDER.

This contract not valid unless countersigned by our manager at Lansing, Mich., and app. at Akron.

Countersigned, Lansing, Mich., Feb. 27, 1894.
R. H. WORTH, Manager.

Across the back of said contract are the words, "Approved April 29, 1894. IRA M. MILLOY, Secretary."

FINDINGS OF LAW.

On the above and foregoing findings of facts the court found the following conclusions or findings of law:

"1. The business of Aultman, Miller & Co. as carried on under and in pursuance of the said contract is an interstate commerce business, and said company is not subject to section one of the Michigan franchise-fee act of 1891, as amended by act No. 79 of the public acts of Michigan of 1893, and said last named act is, so far as it applies or purports to apply to foreign corporations like Aultman, Miller & Co. which are doing in Michigan an interstate commerce business, is in conflict with the provision of the Constitution of the United States authorizing Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes.

2. Said contract was made and executed in the state of Ohio and is an Ohio contract, and it does not pro-

vide for the transaction of any business in Michigan other than an interstate commerce business, and the plaintiff is therefore within the protection of the constitution of the United States.

3. Upon the facts found the plaintiff is entitled to recover the sum of $5,052.56, with interest, at six per cent, from Nov. 3, 1894, and a judgment will therefore be entered in favor of the plaintiff and against the defendant for $5,212.56 and costs of suit, to be taxed."

Which conclusions of law were duly excepted to. The court also made general findings which appear in the record, and to which also exception was duly taken, and the case was removed to this court on writ of error.

SPECIFICATION OF ERRORS.

1. The court erred in holding that "the business of Aultman, Miller & Co. as carried on, under and in pursuance of the said contract, is an interstate commerce business, and said company is not subject to Section 1 of the Michigan franchise-fee act of 1891, as amended by act No. 79, of the public acts of Michigan of 1893, and said last named act is, so far as it applies or purports to apply to foreign corporations like Aultman, Miller & Co., which are doing in Michigan an interstate commerce business, is in conflict with the provision of the Constitution of the United States, authorizing Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes."

2. The court erred in holding that "said contract was made and executed in the state of Ohio and is an Ohio contract, and it does not provide for the transaction of any business in Michigan other than an interstate commerce business, and the plaintiff is therefore within the protection of the Constitution of the United States."

3. The court erred in holding that "defendant was not a resident local agent of the plaintiff, but was an itinerant vendor."

4. The court erred in holding that "the statute of the state of Michigan imposes a tax upon the corporations included within its provisions for the privilege of selling their wares in Michigan, and is therefore a tax upon interstate commerce within the provisions of the Federal Constitution."

5. The court erred in entering judgment for the plaintiff and against the defendant.

6. The findings of fact do not support the conclusions of law.

ARGUMENT FOR PLAINTIFF IN ERROR.

It is well settled that a corporation has no legal existence outside of the state where it is chartered, and that it can make no valid contracts in another state unless permitted by interstate comity, and this is never extended where the policy of the state forbids.

Bank of Augusta vs. Earle, 13 Pet. 519.
Horn Silver Mining Co. vs. New York, 143 U.S. 305.
Paul vs. Virginia, 8 Wall. 168.

There is no claim in this case that defendant in error is engaged in Federal business. The only question at issue then, is as to whether this contract is protected by the clause of the Federal Constitution giving Congress power to regulate commerce.

It is claimed on the part of defendant in error that this contract was one for the transaction of interstate commerce, and therefore that a statute which declared it void would be an interference with such commerce and a violation of the Constitution. It becomes necessary therefore, to examine the contract and findings

of facts in the case, compare them with the interpretation of this clause of the Constitution by the courts, and see if the claim can be sustained.

I.

What were the powers and duties of Holder under this contract as shown by the findings of facts and the contract?

1. He had full authority to sell and not merely to take orders.

The opening paragraph expressly gives him authority to *sell*, and not merely to take orders. He farther agrees: First, "to use all reasonable diligence in canvassing and supplying said territory with said machines." Second, to sell at list prices; to grant credit only to responsible persons, and to redeem all approved notes. Third, to endorse certain notes. Fourth, to promptly remit cash received for sales. Fifth, to keep a correct record of sales. Tenth, "to sell and deliver all machines set up and used as samples or settle for same in cash or approved notes at settlement time." (Rec. pp 19 to 21).

On the part of the company it agrees: First, to furnish second party with machines. Second, to allow him certain commissions for "receiving, handling, storing, *selling*, setting up and starting machines." Third, to furnish repairs for sale on commission. And in the notice at the end of the contract it is specifically agreed that "no canvasser or expert that may be sent to aid you shall have any authority to make any change whatever in our contract with you, and *all sales made by him will be subject to your approval or rejection.*"

The contracts referred to in the seventh finding of facts (Rec. p 17), are the contracts mentioned in the sixth finding of facts, namely, contracts with agents.

The tenth, eleventh and twelfth findings of facts (Rec. p 18), show that until after sales are all completed no account of any nature is kept with customers, and then it is only with regard to such notes as may be accepted by the company.

We submit that a fair construction of these provisions of the contract and findings of facts, fully bears us out in the claim that Holder had full authority to make sales, and was not in any respect limited merely to receiving orders. The bargain was to be entirely closed by him, the sale completed, and the machine delivered and set up, and the company held him responsible for the collection of the notes.

2. No goods whatever were shipped direct to customers, but all were sent to the commission agent.

This is explicitly affirmed in the sixth and eighth findings of facts (Rec. p 17). It also follows from the fourth, fifth, sixth and tenth agreements of the second party in the contract (Rec. pp 19 to 21), and the first agreement of the first party (Rec. p 21).

3. Sales were made after the machines reached the agent, and were not in any case completed in Ohio.

With reference to this it appears from the contract that the agent agreed: Fourth, "that all machines and repairs of machines, and all other goods received on commission under this contract, shall be held by the said second party on special storage and deposit as the property of the first party until converted into notes or money;" that these notes are to be held "as the property of Aultman, Miller & Co.," and that machines sold are set up and started. This has been sufficiently commented on already. Sixth, " to receive all machines, extras or other goods shipped or delivered on account to said first party," "to promptly execute orders for transfer of machines," and in case of failure in either of these

matters "to pay said first party for all machines remaining on hand at settlement unsold by reason of such failure." Tenth, "to sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time." (Rec pp 19 to 21.)

It seems perfectly clear that these agreements are meaningless unless understood to apply to a stock of machines which are to be shipped to the agent, and which he is to retain and sell on commission, making the sales himself, as referred to above, and that they are entirely inconsistent with any sale completed in Ohio, or where shipment is to be made directly to the purchaser. This is particularly true of the sixth, eighth and tenth agreements.

First party agrees: First, "to furnish said second party such machines of the kinds they make as may be wanted to supply said territory so long as their stock on hand will enable them to fill the orders." This is perfectly clear if all transactions were to be with the agent, but is meaningless as applied to a mere drummer. The third is an express agreement to furnish him a stock of repairs, etc., to be kept and sold on commission. These certainly are not mere orders. (Rec. pp 21 and 22).

The eighth finding of facts (Rec. p 17) already referred to, is equally inconsistent with any other interpretation than that of a shipment to the agent, and a subsequent sale by him. The ninth finding of facts (Rec. pp 17 and 18), concedes that some of the agents keep a stock of repairs on hand for sale on commission. The size of this stock can make no possible difference.

4. The authority given in the first paragraph of the contract, to sell in certain territory, and the first agreement of the agent, to canvass the territory and supply it with machines, might be understood to make him an

itinerant agent, or vendor, but if so, he is an itinerant vendor with a local residence and place of business at the village of Laingsburg (Rec. p 19). The same conclusion follows from the provisions of the contract relating to the storage and care of unsold machines. The sixth stipulation of facts calls him a local commission agent, not an itinerant. (Rec. p 21).

But whether he be considered an itinerant or not, is, as we will try to show hereafter, immaterial. The important point is the character of the business which he transacted; the manner in which sales were made by him.

II.

If what we have stated above is true as to the nature of the business transacted under this contract, then the case is governed by *Am. Harrow Co. vs. Shaffer*, 68 Fed. Rep. 750; *Machine Co. vs. Gage*, 100 U. S. 676, and *Emert vs. Missouri*, 156 U. S. 296.

1. In the last case defendant Emert had been arrested for peddling without a license. The facts showed that he was in the employ of the Singer Sewing Machine Company on a salary, engaged in going from place to place in Montgomery county, Mo., with a horse and wagon soliciting orders for the sale of Singer sewing machines; that he carried with him a new Singer sewing machine which he offered for sale to various persons at different places, and finally sold and delivered. (p 297.)

The court considered at considerable length, the power possessed by states to lay restrictions upon peddlers, and sustained it as a valid exercise of the police power of the state. It also considered the previous decisions bearing upon the powers of sale possessed by foreign corporations and held that these decisions only

sustained the right to sell, First, by the person importing the goods, in the original packages, at the point of destination, as in *Leisy vs. Hardin*, 135 U. S. 100, and *Lyng vs. Mich.*, 135 U.S. 161, and, Second, upon orders, received either by mail or through traveling agents, taken before the goods were in the state, and where the shipment of goods on such orders was made directly to the purchaser. *Robbins vs. Shelby County*, 120 U. S. 489 and *Brennan vs. Titusville*, 153 U. S. 289, the leading cases on drummer's contracts, are expressly distinguished on this ground.

2. Comparing the facts relating to the nature of the business transacted under the contract in question, with the facts in the case of *Emert vs. Missouri*, the powers of the agents in the two cases appear to be identical; both were in the employment of the corporation on a salary; in the case of *Emert vs. Missouri*, it does not appear whether this was a commission or not, but it can make no difference. Both had the power to sell; both travelled through their territory "soliciting orders"; both sold and delivered machines. In neither case is there anything to indicate that any machines were ever shipped directly to the purchaser; in neither case is there anything to indicate that any business was conducted after the manner of the ordinary commercial drummer. It is true it does not positively appear that plaintiff in error did carry machines with him around the country offering them for sale, but, after all, the important question is, as clearly appears from the opinion of the court in *Emert vs. Missouri*, not as to the manner of the offering for sale, but as to the sale itself, whether completed before or after the arrival of the goods in the state. The mere question as to whether the goods were or were not carried around the country and offered for sale, might have a bearing

on the question of whether defendant in error was a peddler or not, and was therefore important in the case of *Emert vs. Missouri*, but not as to the manner in which sales were made, or the place of the sales, or, consequently, their right to protection as interstate commerce.

3. Under this case plaintiff in error is not a drummer, and his business is not a drummer's business.

Brennan vs. Titusville, 153 U. S. 289 and *Robbins vs. Shelby County*, 120 U. S. 489, are the leading cases on restrictions of business transacted by drummers. In both of these cases, as noted in *Emert vs. Missouri*, pp 318 to 319, the decision is made to turn upon the fact that the agent's power was limited to taking orders, which were afterward filled by the principal in the foreign state, and the goods shipped directly to the purchaser. These cases, therefore, as interpreted by *Emert vs. Missouri*, result in defining a drummer as one whose business is confined to taking orders in the manner just stated, and who has no power to conclude sales, the test being the place at which, and the one by whom the sales were completed.

Now, applying this test to the case at bar, we find that Holder was not in any sense of the word a drummer. As already noticed there is not one thing in the case to indicate that he ever took an order in the drummer sense of the word. On the contrary he had absolute and complete power to make sales, so complete that when assistance was sent to him from the home office, all sales made by that assistant or expert were to be referred to him for approval. The whole intent and purpose of the contract is clearly to make the entire responsibility of the sale rest upon the agent, and this intent is consistently carried out in every clause of the contract, even to the extent of requiring him to endorse

the notes taken in the sale of machines, of releasing the company from the acceptance of any notes at all, except such as it may approve, and of requiring him to sell and deliver his sample machines on penalty of being compelled to purchase them himself at the option of the company.

4. The two cases, *Brennan vs. Titusville*, and *Emert vs. Missouri*, cited above, seem to fully sum up the powers of a corporation in respect to making sales within a state in which it is not chartered. They also clearly establish another proposition, namely, that if the power to regulate exists at all, it makes no difference how it is exercised; the question is simply whether the business done is interstate commerce or not. If it is, no direct restriction is admissible. If not, being done by a corporation, any restriction that the state may see fit to impose will be sustained. As said by the court in *Brennan vs. Titusville* (p 299):

"Whatever may be the reason given to justify, or the power invoked to sustain the act of the state, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the National government, it cannot be sustained."

On the other hand,

"Whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference if the power to do either exists."

Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365, 375.

Postal Telegraph Cable Co. vs. Charleston, 153 U. S. 692, 696.

Ashley vs. Ryan, 153 U. S. 436, 440.

Horn Silver Mining Co. vs. New York, 143 U. S. 305, 315.

The only cases in which a distinction is made between a revenue tax on property and a regulation under the police power, is where the property is clearly used in interstate commerce. There the distinction is invoked to sustain the tax on the ground that property located within the jurisdiction of the state is subject to taxation within the state, as other property is taxed, whether employed in interstate commerce or not.

Adams Express Co. vs. Ohio, 165 U. S. 194, 220.
Adams Express Co. vs. Ohio, 166 U. S. 185, 218.
Robbins vs. Shelby County. 120 U. S. 489, 494.
Brown vs. Houston, 114 U. S. 622, 632.
Adams Express Co. vs. Kentucky, 166 U. S. 171, 180.

The principle being, as stated in *Welton vs Missouri*, 91 U. S. 275, that the commercial power of the United States "protects it even after it has entered the state, from any burdens imposed *by reason of its foreign origin.*" (p 282.)

No distinction, then, can be made as between the case at bar and *Emert vs. Missouri*, on the ground that one is a tax upon peddlers, and the other a requirement that foreign corporations doing business in the state shall file their articles of association, and pay a franchise fee as conditions precedent to the right to make retail contracts. In both cases the effect, and the clear intent is precisely the same, namely, in the first to protect the citizens of the state against irresponsible peddlers, in the second to protect them against irresponsible corporations. Both cases have a license fee attached which does not in any way change the police character of the law, but, as already seen, if it did it would make no difference whatever.

The cases just cited above, especially that of *Adams Express Company, vs. Ohio*, and the same vs. *Kentucky*,

also emphasize strongly the fact that the real test of whether a tax or regulation is a regulation of interstate commerce or not, is the question of discrimination, which is entirely absent from the case at bar.

III.

But it may be contended that a large proportion of the business done here by Aultman, Miller & Co. under this contract is interstate commerce, and that therefore the contract must be protected. This does not follow. If the company places itself within the reach of state law at all, it must submit to such conditions as the state sees fit to exact.

In the case of *Postal Telegraph Cable Co. vs. Charleston*, 153 U. S. 692, the facts showed that the Postal Telegraph Cable Co. had an office in the city of Charleston, and transacted some local business there, but the amount was very insignificant as compared with its total business, yet the license was sustained.

In *Osborne vs. Florida*, 164 U. S. 650, a law of Florida imposed a license tax upon "all express companies doing business in this state," the amount of which was regulated, not by the amount of business done, but by the size of the place. (p 653). The supreme court of Florida had construed the law as limited strictly to business done within the state, or "local" business. (p 654). The stipulation of facts showed that ninety-five per cent of the business done by the company was interstate commerce, and only five per cent "local." (p 651). The court, however (p. 654), distinguished the case of *Crutcher vs. Kentucky*, 141 U. S. 47, on the ground that in that case the act had "prohibited the agent of a foreign express company from carrying on business *at all* in that state without first obtaining a license," and

thus prohibited interstate as well as local business, and then said (p 655):

"It has never been held, however, that when the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute."

In *Horn Silver Mining Company vs. New York*, 143 U. S. 305, the court refused to consider the fact that the greater part of the company's business was in a foreign state and said (p 317):

"There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the state, according to the amount of its business or capital without the state. That is a matter, however, resting entirely in the control of the state, and not a matter of Federal law; and with which, of course, this court can in no way interfere. * * * The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the state and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company."

In *Pembina Silver Mining Co. vs. Pennsylvania*, 125 U. S. 181, the statute imposed a license fee on corporations that maintained an office within the state "for the use of its officers, agents and employees." The

validity of this tax was sustained, and the court did not consider the amount of the business transacted in the office. This case must be distinguished from a later one brought under the same statute, where it appeared that the office was kept exclusively for purposes of interstate commerce.

These cases show clearly that where a corporation is engaged in both interstate and local business, a law regulating its business will only be held unconstitutional when it applies to *both* the interstate and local, and that if the effect of the law is confined to the local business and it appears some local business is being transacted, the remedy, if it exists at all, must be found in the legislature.

IV.

But if the business to be transacted under this contract is not such as to be protected by the Constitution, it can hardly be claimed that this contract is in itself an act of interstate commerce, and entitled to protection.

Commerce has been defined as intercourse for the purposes of trade, "including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states."

Welton vs. Missouri, 91 U. S. 275, 280.
County of Mobile vs. Kimball, 102 U. S. 691, 702.
McCall vs. California, 136 U. S. 104, 108.
Gibbons vs. Ogden, 9 Wheat. 1, 189.

It cannot be said that the making of a contract of employment is trade, or that it is in any manner connected with the buying, selling or transportation of commodities, or the transportation of persons between

the states. Moreover, many limitations have been placed upon this definition, for example, in *Paul vs. Virginia*, 8 Wall 168, 183, it was held that insurance policies are not articles of commerce, and the reason assigned by the court was that:

"These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration. Such contracts are not interstate transactions though the parties may be domiciled in different states." (p 183.)

See also *Hooper vs. California*, 155 U. S. 648, 654.

But for the same reasons a contract of employment should not be considered as commerce.

In *United States vs. E. C. Knight Co.*, 156 U. S. 1. it was held that the American Sugar Refining Co. in buying all the refineries in the country and thus getting entire control of the manufacture and sale of refined sugar, was not interfering with interstate commerce, for the reason that "commerce succeeds manufacture and is not a part of it." (p 12.) Farther on the court says (p 13):

"Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time

when the article or product passes from the control of the state and belongs to commerce."

But does not a contract employing a person as agent to sell goods just as much "precede commerce," and is it any more a part of it? The law does not absolutely prohibit these contracts, but if it did, would it any more completely control trade or commerce than would the complete monopoly of manufacture that existed in the case cited?

In *Brown vs. Maryland*, 12 Wheat. 419, sales by peddlers and at auction are expressly excepted as not within the protection of the Constitution. Speaking of auctioneers, the court says (p 443):

"Auctioneers are persons licensed by the state, and if the importer chooses to employ them he can have as little objection to paying for these services as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation without annexing to it also, the privilege of using the officers licensed by the state to make sales in a peculiar way."

But since auctioneers were licensed and there was no right to sell at auction except by employing a licensed auctioneer, the effect would be to prevent sales at auction at all unless the license were paid. (Of course the original package sales are not considered.)

In this respect this case seems to be clearly in point. The law would operate simply as a restriction not upon the sale, but upon selling in a peculiar manner, viz., by agents in one case, by auctioneers in the other.

In *Woodruff vs. Parham*, 8 Wall. 123, a non-discriminating tax was sustained even against sales in original packages, and the language of the court in that case is quoted approvingly by Mr. Justice Gray in the case of *Emert vs. Missouri*, 156 U. S. 296, 314.

So, also, the property of a corporation may be taxed the same as other property in the state even though it is wholly employed in interstate commerce.

Adams Express Company, vs. Ohio, 165 U. S. 194, 226.

In *Pittsburg & Southern Coal Co. vs. Louisiana*, 156 U. S. 590, 598, the question at issue was whether a foreign corporation could be compelled to employ the official gager appointed by the state, to gage coal brought in from other states and remaining the property of the corporation. It was held that this was not an interference with interstate commerce and that the right of a state to make and enforce this regulation would be sustained. The court (p 598), after recognizing the fact that a state has no power to restrict commerce, quotes approvingly *Sherlock vs. Alling*, 93 U. S. 99, 102, as follows:

"In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on."

And again (p 599):

"Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution.

See also Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365, 374.

Summing up these cases, the conclusion would seem to be that unless it appears that the tax or license or conditions on which business may be transacted, or whatever the form of regulation may be, operates as a direct interference with interstate commerce, it will not be held to be a restriction upon interstate commerce; that a state has the authority to make such laws as it

deems necessary in good faith for the protection of the life, health and property of its citizens, even though they may indirectly affect interstate commerce, but that it cannot under the disguise of a police regulation, discriminate against it.

But there is no question of discrimination in this case. The same restrictions precisely are laid upon home and foreign corporations. Neither can it be said that this is a direct restriction upon the power of sale. The language quoted above from *Brown vs. Maryland*, applies very closely. It is not the right to sell that is restricted. The company has a perfect right to sell its goods in Michigan by means of drummers or mail orders but the law simply says that it shall not make contracts of employment in this state without filing its articles of association and paying its franchise fee, and that if it does, the state of Michigan will not enforce such contracts. Our claim is, then, that when the United States protects the corporation in the power of sale, it is sufficient, without adding to that the power to make contracts of employment.

V.

The case of *Coit vs. Sutton*, 102 Mich. 324, has been relied upon as decisive of this case; but the opinion in that case must be read in connection with the facts, and from those it appears "that plaintiff was engaged in the business of shipping from Illinois goods manufactured in that state *to its customers* in Michigan, on orders given by mail or taken by its agents in Michigan." These facts put it exactly on the line of *Brennan vs. Titusville*, 153 U. S. 289, and *Robbins vs. Shelby County*, 120 U. S. 489, and entirely outside of *Machine Co. vs. Gage*, 100 U. S. 676, and *Emert vs. Missouri*, 156 U. S. 296. It was the regular "drum-

mer's" order, nothing more nor less. The goods were shipped direct to the customer, and were tendered to him in Michigan and were refused by him there. The sale was completed in the foreign state. It is true that read entirely apart from the facts in the case, the language of the opinion where it says that the act is limited "to foreign corporations whose business within this state consists merely in selling through itinerant agents and delivering the commodities manufactured outside of this state," might possibly be given the construction contended for by defendant in error.

But, as shown by the facts, the agent had no power to sell but simply to take orders. Notice also that the court does not say " selling and delivering through itinerant agents," but "selling through itinerant agents and delivering," the delivering being direct to the purchaser, and not through the agent. The same conclusion follows from an examination of the cases cited by the court in support of the opinion. The whole transaction was an ordinary drummer's sale, nothing more nor less, and does not in any manner correspond with the acts performed under the contract in question.

5. It follows that the business of Aultman, Miller & Co. as carried on under this contract in this state, is not within either of the powers mentioned above; that it is not selling by itinerant agents, whose powers are limited to the negotiation of sales before the goods are introduced into the state, and in which the sale is completed by the shipment of goods directly to the purchaser, nor is it a sale in the original packages by the person importing, at the point of destination. It is, therefore, not interstate commerce, and the principal upon which the case of *Emert vs. Missouri* rests applies to this case. The business done is purely a local busi-

ness; it is not a transaction which starts in Ohio and ends in Michigan. The contract of sale as a contract has its inception, its completion and its performance entirely in Michigan. The place of payment is also in Michigan. Every sale made by the agent under this contract, as necessarily follows from the findings of facts and the contract, is entirely a local transaction, and therefore has no claim to protection under the interstate commerce clause of the Constitution.

6. As has been said by this court in many cases, it is difficult to draw an exact line where the powers of the state leave off and the powers of the Federal government begin, but the limit as established in these cases is as distinct as any that can be found. It seems to be clearly defined by the two cases above cited, and we believe should be resolutely adhered to. If any farther power of sale is conceded to the corporation, it will become practically impossible to set a limit. It is easy to determine whether a sale is made on orders taken by a drummer, or in original packages at the point of destination, or not; but if we go farther and give authority to sell in any other manner, it becomes practically impossible to draw a clear dividing line.

Supposing it were attempted to make a distinction in the manner of making sales as to whether the sale was made by peddlers or by one having a local residence and place of business; this would be about the smallest step that could be taken in advance of the present position, but having taken this it becomes a matter of exceeding difficulty to determine just how any particular sale was made. Moreover, there is no distinction of principle between sales by peddlers and sales by a merchant. In both cases the contracts are purely local, and if once the policy is adopted of recognizing and protecting a local contract in any manner, it becomes

impossible to find a legitimate place to stop. It is comparatively easy in examining a contract of sale to determine from the circumstances of the case where delivery is made and title passes, and therefore whether the sale is completed in the home state or not, and then to let the question of protection turn upon this. Farther than this it is difficult to find a clear principle on which to rely.

IS THE CONTRACT PROTECTED BY ITS PLACE OF MAKING?

But it is claimed that the contract in question was made and executed in the state of Ohio, and is an Ohio contract; that it does not provide for the transaction of any business in Michigan other than an interstate commerce business, and that the defendant in error is therefore within the protection of the Constitution of the United States.

We have already attempted to show that the business provided for by this contract is not interstate commerce, but the conclusion of law referred to above raises the question as to whether this contract is, in law, an Ohio contract in such sense of the word as to make the contract itself an act of interstate commerce and entitled to protection.

I.

The contract is not an Ohio contract.

The general principle governing the place of a contract is that:

"Obligations, in respect to the mode of their solemnization, are subject to the *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of performance, to the law of the place of performance. But the *lex fori* determines when and how such laws when foreign are to be adopted, and in all cases not specified above supplies the applicatory law."

Wharton Conflict of Laws, Sec. 401p.

But the question in this case is not whether the contract was made with the proper formalities or not, nor what shall be the manner of its performance; but it is whether the contract was valid or not, and whether this state must adopt and apply the laws of the foreign state. Therefore, under the rule just stated, the contract must be governed in these respects by the *lex loci contractus* and the *lex fori.*

"The phrase, *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in *Wayman vs. Southard,* 10 Wheat. 1, 48, where he defined it as a principle of universal law,—'The principle that in

every forum a contract is governed by the law with a view to which it was made'."

Pritchard vs. Norton, 106 U. S. 124, 136.

It would be difficult to find a stronger case than the above to illustrate the doctrine for which we contend. Plaintiff had become security for costs for defendant in a suit in Louisiana. Defendant had given him an indemnity bond, which was made, executed and delivered in New York, and by the laws of that state it would have been void. But the court held that since the services for which the bond was an indemnity had been rendered in Louisiana, the contract was subject "in all matters affecting its construction and validity, to the law of that locality."

Moreover, the question at issue was not the construction or interpretation of the contract, but its validity. This would seem to be a sufficient answer to the argument that in the case at bar the question is one of validity, and therefore the place of the contract must be determined by the place of execution. It might also be added that there can be no clear separation between questions of construction or interpretation, and of validity, as far as the test by which they are to be determined is concerned. Each must depend upon the seat of the obligation, and this must be determined by all the circumstances of the case, and not by the mere place of execution, which might be only the result of accident, and if of importance at all, is only so as determining the formalities attendant upon the making and execution of the contract.

"If a contract is made in one state or country, and is to be performed in another, it will be presumed that it was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation and effect of the contract."

1 Beach on Contracts, Sec. 592.
Story Conflict of Laws, Sec. 280.
Andrews vs. Pond, 13 Peters (U. S.) 65, 78.
Wayman vs. Southard, 10 Wheat. (U. S.) 1, 48.
Lamor vs. Micou, 114 U. S. 218, 220.
Watts vs. Camors, 115 U. S. 353, 362.
Coghlan vs. South Carolina R. R. Co., 142 U. S. 101, 109.
Jones Construction of Commercial & Trade Contracts, Sec. 25 and 26, and cases cited.

"The place of the performance of a contract is regarded by the law as supplying the most positive indication of the intention of the parties as to the law which they have desired to incorporate in their agreement; and it is upon the assumption that the contract is to be performed at the place where it is made, that the place of making is referred to for the interpretation of its terms."

Jones Construction of Commercial and Trade Contracts, Sec. 26.
See also to the same effect, 2 Parsons on Contracts, 8 Ed. pp 696 et seq.

But by this test the contract is a Michigan contract, since it is to be performed entirely in that state.

But the intent of the parties will not always control. This is noticed in *Pritchard vs. Norton* cited above, and the case at bar offers an exception exactly in point, namely, where it appears that the direct effect of the change of place of the contract, if not its express intention, was to enable one of the contracting parties to evade or violate the laws of the state in which the contract is to be performed.

Again. The law of the forum determines everything relating to the remedy, including the existence of any remedy at all, since it is a principle too well established to need citation, that no state will enforce a contract made in violation of its own laws or contrary to its

policy. The application of this principle, while not formally making the contract void, would have that effect, for it would deny a remedy. Thus, in the case of the Statute of Frauds, "it has been held that an action cannot be maintained upon a parol agreement, which is not to be performed within a year, although made in France, and valid and enforceable there."

Wood's Law of Master and Servant, 2 Ed. p 385, Sec. 194.

Smith Master and Servant, 36.

But applying either of these tests,—the place with regard to which the contract was made, or the place of the forum,—and the contract is a Michigan contract within the intent of the statute, and cannot be enforced in this state.

According to the terms of the contract itself, it was "made this 20th day of Feb. 1894, between Aultman, Miller & Co. (a corporation duly incorporated under the laws of the state of Ohio), of Akron, Ohio, of the first part, and William Holder of Laingsburg, county of Shiawassee and state of Michigan, of the second part." (Rec. p 19.) It was executed by both parties on that day. (Rec. p 22.)

It was countersigned by the general agent of the company, Feb. 27, 1894 (Rec. p 23), and all of these acts were done in Michigan. The entire performance of this contract was to be in Michigan. This clearly appears from the contract itself. (Rec. pp 19 to 23.) It was not to be executed by the plaintiff in Ohio, but simply approved, and as a thing cannot be approved that has no existence, it must have been completely executed before approval. (Rec. p 23.) Holder was given full and complete authority to *sell*, not to take orders. (Contract, Clause 1, Rec. p 19. Notice Rec.

p 22.) All settlements and payments for services are made in Michigan, although accounts are kept in Akron. (10th and 11th Findings of Facts, Rec. p 18.)

Summing up, every one of the provisions of the contract relates to Michigan and no where else, as the state with reference to which it is made and where it is to be performed, and it is therefore a Michigan contract and within the application of the law. Also, if defendant in error is to have any remedy for the breach of this contract by plaintiff in error, it must be in the courts of Michigan. This follows from the very nature of the contract. Now a state will not enforce a contract made in violation of its laws; it follows that the law of the forum would in this case determine the validity of the contract, since it must determine the existence of a remedy. In other words, the place of this contract for the purpose of this case would be the place where the action is brought for its breach, and this also makes it a Michigan contract.

II.

The condition, "this contract not valid unless countersigned by our manager at Lansing, Mich., and approved at Akron," cannot make it an Ohio contract.

1. It is contended that the effect of this condition is that the contract is incomplete until ratified or approved in Ohio, and that until that approval it has no binding force; that, therefore, the act which gives it validity is performed in Ohio, and that this fact makes it an Ohio contract.

This argument ignores the distinction between the acceptance of an offer and the approval of an act. The contract in this case is not *incomplete*. There are no new conditions to be added, there is no change of substance to be made. The company does not reserve the

right to modify this contract, it can simply accept or reject it entirely. It is not the case of the ordinary commercial or trade contract, where the agreement itself is formed by correspondence between the parties, but is simply an offer on the part of the vendee, which is accepted by the vendor at his place of business, and performed also in the state of the vendor by the delivery of the goods to the carrier. Neither is it the same case as where a proposal is made through an agent of the vendor, who has only power to receive offers, but no authority to accept them or make contracts. In either of these cases, applying the principle laid down at the outset for determining the place of a contract, the place of this contract is clearly at the residence of the vendor, for it is there that the contract is actually entered into and performed. The order, even if signed by the vendee, is not a contract, for it is only signed by him, and not by the vendor. Both the execution and performance of the contract, in other words, are in the state of the vendor, and not that of the vendee.

Not so in this case. This contract was "made and entered into" in Michigan. (Contract, Rec. p 19). It was signed by both parties in Michigan (Rec. p 23); it was countersigned by the general agent in Michigan (Rec. p 23). It was therefore a completed contract, and in no sense of the word an offer. The power of the agent was not limited to exhibiting samples, and receiving an order, but was to make a contract subject merely to a condition precedent.

The effect of approval, then, is not to make a new contract, or to make a contract at all, but to ratify or accept on the part of the home office of defendant in error, the act of its agent performed in the state of Michigan.

2. The same thing follows from the use of the word "approval." We *accept* an offer, we do not approve or ratify it. In other words the word "approval" is practically synonymous with the word "ratification," and signifies in every case the acceptance of a completed act, and never applies to an incomplete one.

"The term 'approved' is only appropriate to a revisory proceeding."

Thaw vs. Ritchie, 5 Mackey (D. C.) 225.

"The meaning of the word is 'to be satisfied with; to commend, to accept.'"

2 Am. & Eng. Enc. of Law, 2 Ed. 519, and notes.

Approve, "To accept as good or sufficient for the purpose intended."

Anderson's Dictionary of Law.

Approval, "The act of a Judge or Magistrate in sanctioning and accepting as satisfactory a bond, security, or other instrument which is required by law to pass his inspection and receive his approbation before it becomes operative."

Black's Law dictionary.

Approved securities must be complete in every respect before they can be submitted for approval. A governor of a state approves a statute, and this gives it validity, but it must be completed and passed before approval, and might even become a law under certain circumstances, without it. A tax roll is approved by the Board of Supervisors, but it is made by the assessors.

An approval of a will was held to have the effect of a republication.

Rich vs. Cockell, 9 Ves. Jr. 369.

To make this a mere offer of an incomplete contract, subject to acceptance, and which would be executed in Ohio, it should have been signed only by plaintiff in

error in Michigan; but it is fully conceded in this case that every act performed by the agent of defendant in error in this state, including the signing of the contract, was fully authorized by said defendant in error.

Declaration, Rec. p 1. Contract, Rec. p 41, 45. Notice Rec. p 45.

3. "A mere formal ratification of a contract in a different state from that in which it was substantially made, is not sufficient ground for construing the contract according to the law of the place where it is ratified."

Jones on Construction of Commercial & Trade Contracts, Sec. 25 and cases cited.

And an examination of the context will show that in the mind of the author "construction" covered also the question of validity. The same follows from the use of the word in the cases already cited.

Palm vs. Medina F. Ins. Co., 20 Ohio, 529, was a case where plaintiff had applied for fire insurance on a building. The blank application contained the provision that:

"All policies of insurance are issued from the office of the company at Medina upon application sent in by agents and others, and if approved, will bear date of the reception of such application." (p. 537.)

It was held that the contract was complete as made by the agent, and for that reason valid, although the application did not reach the company until after the fire.

"A ratification, also, when fairly made, will have the same effect as an original authority has, to bind the principal, not only in regard to the agent himself, but in regard to third persons. * * * In short, the act is treated throughout, as if it were originally auth-

orized by the principal; for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy."

Story on Agency, Sec. 244.

"The ratification operates upon the act ratified precisely as though the authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. And this rule applies as well to corporations as to individuals."

Mechem on Agency, Sec. 167.

"The effect of a subsequent ratification is that it *relates back* and gives validity to the unauthorized act or contract, as of the date when it was made, and affirms it in all respects as though it had been originally authorized. This principle is tersely expressed in the proposition that a ratification is equivalent to an original authorization."

4 Thomp. Corp. Sec. 5289.
See also Golson vs. Ebert, 52 Mo. 260, 271.
Lyall & Teller vs. Sanbourn, 2 Mich. 109, 114.
Cook vs. Tullis, 18 Wall. (U. S.) 332, 338.

The case of Shuenfeldt vs. Junkerman, 20 Fed Rep. 357, 359, appears to be an exception to this rule, but an examination of the case will show that the rule was approved, but the decision was rested on the ground that the sale had been completed and the contract made in the foreign state by the delivery of the goods to the railway company; but even this is questioned in *In re Ins. Co.*, 22 Fed. Rep. 109, 113, in which case the court says, speaking of Shuenfeldt vs. Junkerman, that:

"The court strained the rule in that case to uphold the contract and prevent the success of an unfair proceeding." And, referring to the contract then in question, "the ratification, if ratification were made, relating back to what took place in Canada, it must be held

therefore, that the contract was made in Canada, and, as a necessary result, that the case must be determined by Canadian law."

Applying this doctrine to the case at bar, it follows that when defendant in error approved the contract, it left it complete and perfect as executed, and where executed, by the agent. That is, that the act of approval places the contract in exactly the same situation, and makes it a contract of exactly the same place and time, as it would have been had it been originally executed by the agent, with full authority and without any requirement of, or necessity for, approval.

If the agent had had full prior authority to make this contract and no approval had been required, it would certainly have been a Michigan contract. Now if approval places it in the precise situation in all respects which it would have occupied had there been such authority, it must also make the contract a Michigan contract.

4. But it may be said that this is not a ratification, but that the contract before approval must be taken as a whole, and therefore held to be merely an offer to make a contract, which is executed on the part of the defendant in error by approval in Ohio, exactly as in the case of an ordinary sale through drummers. We do not believe this position to be correct, but even if it were true that the contract must be held to have been executed by defendant in error in Ohio, it does not follow that that makes it an Ohio contract, or that the approval has any other force than that of ratification.

In *Findlay vs. Hall*, 12 Ohio State, 610, defendant had given a note which was a New Mexico obligation. After part payment of the note, two of the defendants in renewal of the balance still due, gave a new note, which, after having been signed by them was sent to

the third defendant in Missouri, and there signed and delivered. The question was on the place of the contract. The court below had charged the jury that they might "look at the whole facts of the case and might say whether defendant regarded and treated it as a New Mexico contract, and if he did so regard and treat it, then it is a New Mexico contract and is governed by the laws of New Mexico, and not by the laws of Missouri."

This charge was approved and the signature of the third partner was held to be, not the making of a new agreement, but a ratification of the act of his co-partners in renewing the old, and not as transferring the seat of the contract to Missouri.

Pugh vs. Cameron's Administrator, 11 West Virginia, 523, was a case in which plaintiff, a resident of West Virginia, had agreed in Ohio with one of the defendants, a resident of Ohio, to pay defendant's debt, in consideration of which defendant had agreed to give his note for the amount with his brother Samuel, a resident of West Virginia, as surety.

A non-negotiable note was made by Joseph in Ohio after plaintiff had paid the debt, and was given by Joseph to plaintiff, who took it to West Virginia, where Samuel signed it. This note having been executed by one of the defendants and delivered in West Virginia, the claim was made that the note was void for usury, the law of West Virginia forfeiting the entire debt for usury. But the court held that when Samuel signed the note in West Virginia, "he ratified the contract made in Ohio," and it was therefore an Ohio contract.

It thus appears that even such an action as the execution of a promissory note in a foreign state may be shown by the circumstances of the case to be nothing but a ratification, and not to change the place of the

contract, and the fundamental principle upon which these cases rest is the one already stated, namely, that the true test of a contract is its full nature and effect as determined by all the circumstances of the case.

This may be illustrated in another way. The parties were in Michigan when the contract was made, and the contract was to be performed there, as already seen. This would then have been the place of the contract, and it must be assumed that this was the place with reference to the laws of which plaintiff in error, at least, executed the contract, since the clause itself does not directly purport to make it an Ohio contract, and nothing is said anywhere in the contract (aside from the clause in question), about any other place. It follows that the ratification cannot change the place of the contract, for if it did, the minds of the parties never met. The contract having been executed subject to Michigan laws, must be approved subject to Michigan laws, or it becomes a different contract, and as will be seen farther on, would have to be accepted again by plaintiff in error, before becoming of any force against him, which, since plaintiff in error resides in Michigan, would make the execution of the contract in Michigan, and it, therefore, according to the rule contended for by defendant in error, a Michigan contract, since until such acceptance it would be merely an offer entirely unaccepted by plaintiff in error.

Of course if the contract had contained a clause providing that it should be an Ohio contract and governed by the laws of that state, a very different condition of things would exist; but that is not the case, for the clause in question is the only one which in any manner refers to any other state than Michigan, and it is in no sense of the word an agreement to be bound by the

laws of Ohio, and there is nothing to indicate that plaintiff in error so understood it.

It also follows from the langauge of the clause and the facts just stated with regard to it, that this clause must be regarded as merely a condition precedent to the taking effect of the contract. But a condition precedent is no part of a contract; it is something that must be performed and finished before the contract takes effect, but when the contract does take effect, it does so as if the condition precedent had never existed.

Story Conflict of Laws, Sec. 279, a.

Thus, it may be shown by parol evidence.

Ware vs. Allen, 128 U. S. 590, and cases cited.

In the above case the evidence showed that an agreement had been made between plaintiff and defendant that the firm should have an opportunity to consult counsel as to the validity of the transaction, and that if such advice was adverse, then the instrument given by them was to be of no effect. (p 595). Parol evidence was admitted to show this agreement. The court says:

"That it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter."

"It is always proper to prove (by parol evidence) the existence of any separate, oral agreement constituting a condition precedent to the attaching of an obligation of a written contract."

Jones on Construction of Commercial & Trade Contracts, Sec. 157.

See also Stevens Dig. Law of Ev., Art. 90 (3).

This rule rests upon the principle that a condition precedent does not vary or contradict the terms of the written contract. But to change the state with reference to the laws of which the contract is made, and by which it must be governed, would certainly be to vary the terms of the contract, in the most material manner. It follows that the ratification or approval cannot change the place of a contract, or it could not be shown by parol evidence.

5. If ratification is equivalent to full prior authority in a case where an act is performed with no authority whatever, much more must it be so when there is full authority on the part of the agent to do just what he did. It may be argued that this is not ratification, and in the strict sense of the word this may be true, but it *is* approval, and there is just that amount of distinction between the strict meaning of the two words; but there can be no difference as to the effect of either upon the contract; it makes no difference whether you ratify an act done without authority or whether you approve an act done with authority, as to the condition of the act after the approval.

6. The same clause provides for both approval at Akron and countersigning at Lansing. If one could change the place of the contract, so could the other, and if the contract were to be countersigned after it was approved, it would convert it back into a Michigan contract. To state this is to show its absurdity; the two occupy the same relation to the contract—they are conditions precedent, and the contract when it takes effect, does so as if they had never existed.

7. Supposing Mr. Ira M. Milloy, the secretary of the company, had happened to be in Michigan and had approved the contract in that state; would it not have been a sufficient approval although not made at Akron?

And, if so, would it have made it a Michigan contract? Or suppose that the condition had been: "Not valid until after approval at Akron, and the termination of all prior engagements of the party of the second part." Would the fact that the approval was given before the engagements terminated make it any more or less a Michigan contract?

8. All the difficulty seems to arise from slight vagueness in the word "approval." It has sometimes been employed in commercial transactions in the sense of acceptance of a proposition, which is altogether wrong. Acceptance of a proposition *makes* a contract, and may therefore determine its place. Approval of an act or contract can never *make*, but simply *ratify* a contract which is already completed.

It follows that since all that is required in the present case is approval and not acceptance, the rule laid down in Story on Agencies, Sec. 244, exactly applies, and the place of the contract is not changed by the ratification.

III.

It is claimed that the use of the word "made" in the act in question limits it to the place of execution of the contract, or the *locus regit actum* as distinguished from the *locus contractus*. The claim is denied by plaintiff in error for the reason that the word "made" as employed with reference to the place of a contract is not necessarily limited to the *locus regit actum*, but in most cases means rather the *locus contractus*, or real seat of the obligation as determined from all the circumstances of the case.

This follows from the doctrine already laid down with regard to the place of the contract on pages 28 to 32 of this brief. The difficulty seems to arise from

the fact that, as said by this court in the case of Pritchard vs. Norton, 106 U. S. 124, 136:

"The phrase *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing."

In that case the court held that the *locus contractus* was not the place where the contract was entered into, which was the state of New York, but that it was the place where it was to be performed, and the validity of the contract turned on that ground. The case is a very important one on the law of place, and there can scarcely be a better statement of the distinction that exists between the place where a contract is entered into, and the *locus contractus*, or place of the contract, than the one therein made by describing the *locus contractus* as "the seat of the obligation." We believe that an examination of the authorities will show that in almost every case this is the sense in which the word "made" is employed in speaking of the place of a contract.

This use of the word "made" is well illustrated in 1 Beach on Contracts, Secs. 585 to 595, inclusive. Sec. 585 lays down the rule that the validity of a contract is to be determined by the law of the place where it is made. The succeeding sections, however, and especially section 592, show clearly that by the word "made" is not meant the place where the contract was entered into, but the place of performance. The same thing appears in Story on Conflict of Laws, Sec. 280, already cited.

So general is the rule that the place of performance is the place at which the contract is in law made, that

most authorities use the word altogether in this sense, and lay down as a general principle that the place of performance is the place of the contract. See for example:

Wharton Conflict of Laws, Secs. 397 to 401.
Andrews vs. Pond, 13 Peters, 65, 77 and 78.

Many other cases might be cited.

In *Pritchard vs. Norton*, 106 U. S. 124, the scope of the *locus regit actum*, as determining the contract, is, as already seen, restricted to the formalities attending, or the mode of solemnization of the contract, in distinction from the substance or validity of the agreement itself.

It is not true, therefore, that the use of the word "made" in the statute restricts its application entirely to the place where it became binding upon the parties. The word must be understood to be employed in its full legal sense, which is the seat of the obligation as determined by the circumstances of the case, of which the place of performance is the most important.

But even this rule of determining the place of a contract must be somewhat qualified. A court will never assist parties in a conspiracy to violate law, still less will it support a foreign corporation in its efforts to force upon the citizens of a state the laws of another state by which they never intended to be bound.

If Aultman, Miller & Co. inserted this clause with the express intention of making the contract an Ohio contract, it could only have been to enable them to evade or violate the laws of the state of Michigan. The contract was made and to be performed entirely under Michigan laws, and with reference to them. Every transaction took place in Michigan. Why, then, should any other laws be held to apply to the contract?

It was not a question of obtaining a greater amount of interest; the only possible reason that can be assigned must be to enable the foreign corporation to do business in Michigan without complying with the provisions of our laws, and the courts will not assist in such an effort.

The rule laid down in *Andrews vs. Pond*, 13 Peters, U. S. 65, 78, then applies, and, as said by the court in that case:

"The question is not which law is to govern in executing the contract; but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute."

In that case a bill of exchange had been given in New York for acceptance in Mobile, and it was claimed that usury had been concealed under the name of exchange.

Rowland vs. Building and Loan Association, (N. C.) 18 S. E. Rep. 965, was a case in which a building and loan contract was alleged to be usurious. Defendant resided in North Carolina, where the suit was begun. Plaintiff was a Virginia corporation. The court says:

"Calling it a Virginia contract does not make it one. Sending the application to the "home office," as it is called; remitting the money from Richmond; calling the local board and its treasurer the agents, not of the corporation, but of the members who live in that locality; providing in the bond that it shall be paid in Virginia,—all these things cannot enable the foreign corporation to evade the usury laws of the state."

In other words, if a violation of the law of a state is intended by a contract, the court will not allow it to succeed by a pretended ratification, approval, or even execution in a foreign state.

In *Herschfeld vs. Dexel & Co.*, 12 Ga. 582, one Mjndhime, a resident of Georgia, had made, executed and delivered in New York an assignment of his stock of goods in Georgia. The goods were afterwards attached by creditors of Mindhime. Regarding the validity of the assignment the court says:

"But to give the plaintiff in error the full benefit of his objection, we will admit that this assignment is legal and valid in New York, and would be executed in that state. Still, we are not required by the comity of states, to enforce within our bounds or jurisdiction, a contract made elsewhere, and which not only contravenes the policy, but violates a positive statute of this state." (p 586.)

In *Lewis vs. Headley*, 36 Ill. 433, the parties had entered into a contract in New Jersey, by which plaintiff, a New Jersey bank, was to furnish the Illinois bank with its money in denominations smaller than $5 for circulation in Illinois, which was contrary to the laws of Illinois. The money was sent to Illinois, and defendant gave its notes for the amount, and put the money in circulation. In an action to recover on the notes, it was held that the contract was performed in Illinois, and since the act was in violation of the laws of that state, it was void and would not be enforced, and that a knowledge of the provisions of those laws would be presumed.

See also Hooper vs. California, 155 U. S., 648, 658.

Many other cases to the same effect might be cited, but these seem sufficient to establish the rule that the court will look at the real intent and effect of a contract which is to be performed in the state where suit is brought, and if that intent and effect be to violate or evade the laws of a state, it will refuse to enforce the

contract unless it is protected by the higher law of the Constitution.

But it is perfectly clear that to construe the word "made" as asked by defendant in error, would have just this effect. It would compel the courts of the state of Michigan to enforce a contract, and would validate proceedings and agreements, made in direct violation of its laws, and expressly intended for that purpose.

It also follows that such a construction is entirely unnecessary, since under the cases cited above, the courts of Michigan have a perfect right to refuse to enforce this contract. Can it be presumed that the legislature voluntarily deprived itself of a power it possessed, and tied its own hands, by limiting the application of the law to the place where the contract was entered into or first became binding upon the parties? Or can it be presumed that a construction of the word "made" was intended that would have this effect, when such construction is wholly needless?

2. To construe the word "made" as limited strictly to the place where the contract became binding upon the parties, would be to defeat entirely the purpose of the law.

In *Hooper vs. California*, 155 U. S. 648, it had been argued that in procuring insurance for a resident of the state in a foreign company, the agent acted as the agent of the insured and not of the insurer, and that therefore the contract was made outside the state, but the court says (p 658):

"If the contention of the plaintiff in error were admitted, the established authority of the state to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only

necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the state, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a state government depend not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable."

But the effect of considering the insurance agent as the agent of the insured instead of the insurer, or of a clause in the contract making such provision, would be precisely the same as that of the construction of the clause in the contract in question providing for approval in the foreign state, contended for by defendant in error, and the same consequences must follow such construction of the act. The case is therefore closely parallel, and the remarks above quoted are exactly in point.

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Lau Ow Bew vs. U. S., 144 U. S. 47. 59.
Church of the Holy Trinity vs. U. S., 143 U. S. 457.
Henderson vs. Mayor of New York, 92 U. S. 259.
United States vs. Kirby, 7 Wallace, 482.
Oates vs. Nat. Bank, 100 U. S. 239.

Church of the Holy Trinity vs. United States, cited above, was a case arising under the contract labor law. The act in question was, as conceded by the court, strictly within the letter of the law; but applying the

principle stated above, the court held that the intention of the legislature could not have been to extend the provisions of the act to the class of contracts in question, and that the law was not intended to apply to them. There is therefore ample authority for the construction of this word in such a manner as to effectuate, and not defeat the purpose of the law.

3. This act is part of the general system of laws of the state of Michigan for the control of corporations.

In the year 1868, this court, in the case of Paul vs. Virginia, 8 Wallace, 168, said:

"At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state would, in fact, be controlled by corporations created by other states." (p 181.)

These words of Mr. Justice Field may almost have been considered prophetic. It is impossible to exaggerate the dangers that threaten the people of this country from the unrestricted growth and power of corporations, and this court should hesitate long before declaring unconstitutional any measure which seeks to subject them to the control of the state governments.

If these corporations were operating under charter derived from the general government of the United States, it would be altogether different. The power which created, could be relied upon to control them;

but since no state can make its laws effective beyond its own limits, the state in which a corporation is chartered can exercise no effectual control over its actions in any neighboring state, and neither can a state reach to any effect a corporation chartered in a neighboring state, unless that corporation can be compelled in some way to subject itself to its laws.

But to give to this word the construction contended for by defendant in error, would be to take from the state all power to control corporations, for it would be easy to so construct a contract that it would in every case become binding in the foreign state. It would be perfectly possible in this way for a corporation to transact its entire business in any given state without once placing itself within the reach of its laws, or without giving the citizen any remedy against it except by going into a foreign state. No foreign corporation would ever, under those circumstances, file its articles of association in any state other than the one in which it was chartered; it would make no reports; nothing would be known of it, or of its business. The whole situation would be subversive of the interests of the people of this country.

But even if the evil should not go to this extent, still we do not believe this construction can be sustained. The legislature of Michigan must have intended to subject these corporations to state control as far as the Constitution and laws of the United States would permit. It cannot be supposed that they intended to leave this a mere nominal control, as would be the case if the construction contended for is to be used. It follows, then, that the intent of the legislature to restrict the powers of the corporation that might be exercised in Michigan without complying with the provisions of the state law, must have been limited simply by the power of the

state under the Constitution and laws of the United States, and that therefore the law was intended to apply to all contracts which would not be protected by the "interstate commerce" clause of the Constitution, and such a construction should be placed upon the language of the act as will most effectuate this intention, and leave to the state the greatest possible freedom and the most perfect control of its own internal affairs, consistent with the perfect freedom of interstate commerce.

This is not a penal statute to be construed strictly. The statute does not act upon the offender and inflict a penalty; it simply acts upon the offense by setting aside the illegal transaction, and hence is to be construed liberally.

1 Blackstone, 88.

IV.

But even if we use the word "made" in the sense of the place in which the final act which made the contract binding upon both parties was performed, it does not by any means follow that this contract is not within the application of the law.

1. "The power to ratify an act done for and in behalf of another, necessarily presupposes in that other the power to do the act himself, both in the first instance and at the time of ratification; it also presupposes the power in that other to have authorized the doing of the act in the first instance and also to authorize its doing at the time of ratification."

Mechem on Agency, Sec. 111, and cases cited.
Western National Bank vs. Armstrong, 152 U. S. 346, 352.

"It is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. As said in one of the cases cited by counsel,

'the ratification is the first proceeding by which he (the principal ratifying) becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself.'"

Cook vs. Tullis, 18 Wallace (U. S.) 332, 338.
Marsh vs. Fulton County, 10 Wallace. (U. S.) 676, 684.

"To ratify is to give validity to the act of another, and implies that the person or body ratifying has *at the time*, [Italics ours] power to do the act ratified."

Norton vs. Shelby County, 118 (U. S.) 425, 451.

"A transaction originally unlawful cannot be made any better by being ratified."

United States vs. Grossmayer, 9 Wallace (U. S.) 72, 75.

But unless this contract is protected by the "interstate commerce" clause of the Constitution, defendant in error would have had no power to enter into it at the time and place in which it was originally executed. To say that by reserving the right of approval in another state they could make a contract legal and valid which would otherwise have been illegal, is simply to say that they could indirectly ratify an illegal action.

All that would be necessary in any case would be for the corporation to go on and make any contract it sees fit by its agents whether valid or not, reserve the right of approval, and then ratify it in another state, and make it legal. Such an evasion of the law is not entitled to any favor from the courts.

In other words, the position taken by us here is that defendant in error could not approve this contract so as to give it any life or validity, unless it could have originally made it at the time, and in the place at

which it was originally executed between plaintiff in error and defendant in error.

In the case of *Webber vs. Howe*, 36 Mich., 150, plaintiff, an Ohio liquor dealer, had made in Detroit a contract of sale of liquor. He afterward brought suit to recover damages. The defense was the illegality of the contract. The statute avoided all sales and "all contracts or agreements relating thereto." It was argued on the part of the plaintiff that the sale was really completed by acceptance and delivery of the goods in Ohio, and that the contract, being verbal and for more than $50, was void under the statute of frauds, and consequently did not take effect as an agreement until acted on by the delivery of the goods to the carrier in Ohio, and that it was therefore an Ohio contract. But the court held that no matter which view of the case was taken it would not help plaintiff; that:

"If void originally it would not become binding upon the purchaser until he should do something in ratification of it, and it does not appear that anything further was done by him until the liquors were received in this state." (p 154.)

It may be urged that that case is distinguished from the one at bar by the fact that the order was there taken by plaintiff in person, but we think this does not affect the purpose for which we cite the case, which is to establish the rule as stated above by Judge Cooley. In other words that wherever a contract is for any reason void originally, it is not binding upon either party, and an acceptance by one cannot bind the other until he, on his part, does something in affirmance or acceptance of it. The contract as made being void, there is no contract at all in such a case, and the approval, acceptance or shipping of the goods becomes

a mere offer which only becomes a contract by the acceptance on the part of the other party. The last act therefore, which gives it validity is done, not in Ohio, but in Michigan.

3. Applying this doctrine to the case at bar, Aultman, Miller & Co. could not originally have made this contract in Michigan; they could not therefore ratify it so as to give it any validity. Their approval of the contract, then, cannot bind plaintiff in error, until he, in his turn, does something in acceptance of that contract, and it does not appear that anything was done by him outside of the state of Michigan. Under the rule just stated, then, the last thing done which made this contract valid and binding upon both parties, was done in Michigan by plaintiff in error. The contract is, therefore, a Michigan contract, and strictly within the application of the law.

4. Comity has nothing to do with this case. It is too well settled to need citation that the principle of comity will never be applied by a state so as to enforce contracts which are made in violation of its laws, no matter where they are made. If these contracts are enforced at all it is because they are protected by the higher law—the "interstate commerce" clause of the Constitution. Many cases might be cited which apparently rest on the fact that a certain contract was made in another state, and will therefore be enforced; but if these cases are examined, we believe that it will be found universally true that the real reason for affirming the contract was not that it was made in the foreign state, but that *being* made in the foreign state, it was protected by some clause of the Federal Constitution usually either the "interstate commerce," or the "rights and privileges" clause. Wherever the question as to the effect of comity has arisen, the decision has been as

above stated, if the transaction was contrary to the local laws.

It follows that the only protection this contract can have, if it has any, is in the "interstate commerce" clause of the Constitution. It is too well settled to need citation that a corporation can claim no protection from any other part of the Federal Constitution against restrictions upon its trade or intercourse with the citizens of other states. It is not the case of a citizen of a state going into a foreign state and making a contract there; but it is the case where a corporation comes into a state, and there attempts to transact business contrary to the laws of the state.

It is contended that this is a similar case to the contract labor law, and that under that law a vital element of the offense is the making of a contract in the foreign country with a non-resident alien previous to the immigration or importation of such alien into the United States; that there as here, the character of the act is made to depend upon the locality of the execution of the prohibited contract with the alien and the cases of *United States vs. Craig*, 28 Fed. Rep. 795, 799, *United States vs. Edgar*, 45 Fed. Rep. 44, and 48 Fed. Rep. 91, are cited as supporting this doctrine.

While it is true that there must be a contract, the offense is not in the making of a contract, but the encouraging of immigration while under contract.

As we understand these cases the question is not as to the place of the contract, but simply as to whether there was a contract, and if that contract had been made in the United States with an agent of the alien, having full power to contract on behalf of his principle, the encouragement of immigration while under such contract would be just as much a violation of the law. The cases therefore, are not in any respect similar.

V.

But if the contract is void, defendant in error cannot recover in this action.

1. "Parties cannot be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the state. It is an elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction."

Arbuckle vs. Reaume, 96 Mich. 243, 245; 55 N. W. 808.
7 Wait, Act. and Def. p 114.
Myers vs. Meinrath, 3 Amer. Rep. 368, 371.

In the first case a sale was made on Sunday and it was attempted to validate it by making the place of payment of the notes in Ohio.

"The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover, (Citing many cases). In Bank vs. Owens (2 Pet. 527, 539) this court said: 'There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal'."

Miller vs. Ammon, 145 U. S. 421, 426. See also Central Transportation Co. vs. Pullman's Car Co., 139 U. S. 24, pp 54 and 55.

If it be argued that this is oppressive and that it will enable dealers to evade their honest obligations, the answer is:

"The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced."

Coppell vs. Howe, 7 Wallace, (U. S.) 542, 558.
See also Erwin vs. Williar, 110 U. S. 499, 510.
Gibbs vs. Baltimore Gas Co., 130 U. S. 396, 411 and 412.

In this last case the action was on the common counts.

VI.

Plaintiff in error, therefore, claims that neither this contract, nor the business to be transacted under it are acts of interstate commerce; that the contract is a Michigan contract within the intent and meaning of the statute, and that it follows that it is not entitled to protection under Article 1, Section 8, Clause 3 of the Constitution of the United States, and that the decision heretofore rendered in this case should be reversed.

CLARK C. WOOD,
Attorney for Defendant.

No. 109.
Sup. Ct. of Wash. for P. C.
Filed Nov. 17, 1897.
16158.

SUPREME COURT OF THE UNITED STATES.

WILLIAM HOLDER, *Plaintiff in Error,*

vs.

AULTMAN, MILLER & CO., *Defendant in Error.*

Supplemental Brief for Plaintiff in Error

On the question of a right to disregard the contract and recover on the common counts, in addition to the arguments and cases in the brief for plaintiff in error on pages 56 and 57, we beg leave to submit the following:

1. The recovery in this case was not on the common counts, but under the contract. Thus the court says in the third finding of facts (Rec. p, 17):

"There is a balance due the plaintiff from the defendant *under said contract* of five thousand and fifty-two and fifty-six hundredths dollars ($5,052.56)."

The same thing follows from the findings of law whieh make the contract interstate commerce, and therefore valid.

2. This case is exactly within the provisions of How. Ann. Stat. Sec. 8136, which provides that:

"When, by the laws of this state, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law,

and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act."

Notice here that the prohibition against recovery is as broad as it can possibly be made, and includes every right or obligation express or implied.

3. The courts of Michigan would not permit recovery in any manner, either upon the contract or the common counts.

Seamans vs. Temple Company, 105 Mich. 403, was a case where a foreign insurance company undertook to recover upon an assessment note. In Michigan actions upon notes are brought on the common counts, and the note is introduced in evidence under these counts. The corporation had not complied with the law, and no recovery was permitted. The Court cites the Statute referred to, and also says:

"It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this state. The object is to protect the citizens of this state against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this state."

The intent of the law is precisely the same in the two cases.

People's Mutual Benefit Society vs. Lester, 105 Mich. 717. The record shows this case to have been an action on the common counts brought by a foreign mutual benefit society to recover money which had been paid by policy holders of the company to defendant, an agent for the company, for the use and benefit of the company. No recovery was allowed, on the ground of public policy and the statute above cited.

4. It is true that many cases exist where a recovery has been allowed for money had and received or in some other similar manner, on *ultra vires* contracts made by a corporation. Many of these cases are collected in *Central Transportation Co. vs. Pullman Car Co.*, 139 U. S. 24, cited in our brief, but an examination of these cases shows that in none of them was the contract illegal, and in none of them was the party seeking to recover, a guilty party, or taking advantage of his own wrong. There is a clear distinction between an *ultra vires* and an illegal contract that should not be forgotten in this connection. Where a contract is merely *ultra vires*, the thing itself is proper enough; it is only the manner of doing it that is out of the power of the company, but in this case the whole transaction is absolutely illegal if not interstate commerce, and in such a case the courts will simply have nothing to do with the transaction. They will not affirm the contract, neither will they disaffirm it, but they will leave the parties just where they found them.

5. Neither is it a case of a voidable contract which can only be rescinded by placing the parties in *statu quo*. The contract was absolutely void from its inception, and if not interstate commerce was made for the express purpose of violating the laws of the state of Michigan.

6. An examination of the declaration shows clearly that plaintiff in the court below sought to recover simply on the contract, and that the common counts were only introduced to allow recovery in case some defect existed in the special count.

7. To allow plaintiff to recover on the common counts would be to enable the company to completely nullify the Michigan Corporation Franchise Act. All that is necessary is to make their contracts without any

regard as to whether they are illegal or not; go on and fulfil them on their part, and if the other parties raise the objection that the contract is illegal and void, recover all the benefits to which they would have been entitled under the contract; under the common counts as for money had and received, or on the ground of estoppel. The purpose of the law was to prevent the doing of business by unauthorized companies, but if they can do the business just as well under the common counts, they care very little for the letter of the contract. As has been said by this court again and again, the defense is allowed, not for the sake of the defendant, but for the sake of the law, and the general principle underlying the whole is that no rights can arise in any manner whatever, either directly or indirectly, out of an illegal act; there can be no remedy for that which is illegal.

There is no question in this case as to whether plaintiff might not have recovered in an action of trover or repleven, disregarding the contract entirely. It has not sought to do this.

Respectfully submitted,

CLARK C. WOOD,

Attorney for Plaintiff in Error.

Supreme Court, U. S.

FILED MAY 14 1917

JAMES D. MAHER, CLERK

NO. 39.

WILLIAM HOLDER,

Plaintiff in Error,

vs.

AULTMAN, MILLER & COMPANY,

(A Corporation)

Defendant in Error.

Brief of Defendant in Error.

FRED A. BAKER,

Attorney for Defendant in Error.

GLEN L. SADLER,
JOHN A. BRADLEY,
Of Counsel.

Detroit, Mich.,
JOHN S. BEY & CO., PRINTERS.
1917.

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

WILLIAM HOLDER,
Plaintiff in Error.

vs.

AULTMAN, MILLER & CO.,
A CORPORATION,
Defendant in Error.

No. 109.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

At the legislative session of 1891 the Michigan Legislature passed the following act:

"An Act to provide for the payment of a franchise fee by corporations.

"Section 1. The People of the State of Michigan enact, That every corporation or association hereafter incorporated by or under any general or special law of this State shall pay to the Secretary of State a franchise fee of one-half of one mill upon

each dollar of the authorized capital stock of such corporation or association and a proportionate fee upon any and each such subsequent increase thereof: Provided, That the fee herein provided for shall in no case be less than five dollars.

"Sec. 2. The Secretary of State shall not receive for filing or record the articles of association of any corporation or association unless accompanied by the fee provided for in this act.

"Sec. 3. The fees collected under the provisions of this act shall be paid into the State treasury and placed to the credit of the general fund."

Public Acts 1891, p. 240.

In 1893 Sec. 1 of the foregoing act was amended so as to read:

"Section 1. The People of the State of Michigan enact, That every corporation or association hereafter incorporated or formed by consolidation or otherwise, by or under any general or special law of this State, which is required by law to file articles of association with the Secretary of State, and every foreign corporation or association which shall hereafter be permitted to transact business in this State (which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein), shall pay to the Secretary of State a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof; and that every corporation heretofore organized or doing business in this State which shall hereafter increase the amount of its authorized capital stock, shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof: Provided, That the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorpor-

ated under the law of this State, or foreign corporation authorized to do business in this State, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the first day of January, eighteen hundred and ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly void."

Public Acts 1893, p. 82.

It will be observed that the Act of 1891 only applied to such corporations as might be thereafter organized under the laws of Michigan, and had no application to corporations organized in other States.

This was changed by the amendatory Act of 1893, so as to make the Act applicable to all foreign corporations "which shall hereafter be permitted to transact business in this State."

An exception is made of foreign corporations which "prior to the passage of this act have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein." This exception has reference to foreign corporations which had previously complied with the provisions of an Act, approved June 20, 1889, amending the Act of 1885 for the incorporation of manufacturing companies, and which amendatory Act is as follows:

"Sec. 37. Corporations organized under the laws of any State of the Union, or of any foreign country, either wholly or in part, for any of the purposes contemplated by this Act, upon recording copies of their charter, or articles of incorporation, or memoranda of association, as provided in Section 9 of this Act, and upon filing in the office of the Secretary of State a resolution, as required in general section 4331 of Howell's Annotated Statutes, and appointing an agent for service of process, may, for such purposes, carry on business in this State, and shall enjoy all the rights and privileges, and be subject to

all the restrictions and liabilities of corporations existing under this Act."

Public Acts 1889, p. 195.
3 How. Stat., Sec. 4161 d6.

Section 9 of the Manufacturing Act of 1885 simply provides that before any corporation organized under it shall commence business, its articles of association shall be recorded in the office of the Secretary of State and in the office of the County Clerk of the county where the operations of the corporation are to be carried on.

3 How Stat., Sec. 4161, a8.

Section 4331 of Howell's Statutes requires each foreign insurance company doing business in Michigan to file a resolution with the Secretary of State authorizing service of process upon its agents in this State.

Section 37 quoted above of the Act for the Incorporation of Manufacturing Companies, requires foreign corporations organized "either wholly or in part for any of the purposes contemplated by this Act" to file their articles, and otherwise to "be subject to all the restrictions and liabilities of corporations existing under this Act."

The amendment of 1893 to the Act of 1891, requiring the payment of a franchise fee, makes it necessary for the foreign manufacturing corporation, in addition to the filing of its articles, to pay the same franchise fee as is required of the domestic corporation when it is organized, so that in substance the foreign corporation becomes incorporated under the laws of Michigan, and is made subject to all the restrictions and liabilities imposed by those laws.

There does not appear to be any legislation expressly requiring foreign corporations, other than manufacturing, to file their articles of association in Michigan or subjecting them generally to the laws of the State, but the payment of a franchise fee of one-half of one mill upon each dollar of authorized capital stock

is imposed upon all foreign corporations without distinction or qualification by the Act of 1893.

According to this legislation, if valid, no foreign corporation after January 1, 1894, could or can be permitted to transact business in Michigan unless it first pays the franchise fee prescribed by the Act; and all contracts made in that State since that date by such corporations, which have not first paid the franchise fee, are wholly void.

FINDINGS OF FACTS.

First—On the 29th day of April, 1894, the parties to this suit entered into a written contract, a copy of which, marked "Copy of Contract," is hereinafter set forth. Said contract was executed, accepted and approved as set forth in said contract, and in the endorsement on the back thereof.

Second—The provisions of said contract, in so far as plaintiff is concerned, have been fulfilled.

Third—There is a balance due the plaintiff from defendant under said contract of five thousand and fifty-two and fifty-six hundredths dollars ($5,052.56).

Fourth—Aultman, Miller & Company is a corporation organized and existing under the general laws of Ohio, having its corporate office in the City of Akron, County of Summit and State of Ohio, and having its manufactory at the same place.

Fifth—Aultman, Miller & Company do not manufacture any goods whatever within the State of Michigan.

Sixth—Aultman, Miller & Company sells its goods in Michigan by means of local commission agents, and it has a general agent at the City of Lansing, in Michigan, and its commission agents are under similar contracts with the plaintiff to the one set forth in this action.

Seventh—All contracts are sent to Aultman, Miller & Company at Akron, for approval or rejection, before taking any effect.

Eighth—The goods sold by Aultman, Miller & Company in the State of Michigan, and manufactured at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agents, forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent, or in bulk to Lansing or various points throughout the State, and re-shipped in smaller lots direct to the commission agent.

Ninth—Aultman, Miller & Company own a warehouse in the City of Lansing for the transfer of such re-shipments, for the temporary storage of a small stock of extras or repairs, which experience has shown may be suddenly needed by customers throughout the State during the harvest season. A portion of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of their customers. These are partially commission goods and partially goods sold direct to them.

Tenth—Accounts with every commission agent in the State of Michigan are kept at the office of the plaintiff in Akron, Ohio.

Eleventh—The plaintiff effects settlements with its commission agents by sending to its general agent copies or statements of all such accounts. The general agent and his assistants check over the season's work with the commission agent, collect pay for the machines sold, in notes or cash, or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and the notes so taken are subject to the approval or rejection of the plaintiff.

Twelfth—All notes taken by the commission agents of Aultman, Miller & Company are sent through its general agent at Lansing to the factory at Akron, Ohio, where they are numbered, recorded, filed and retained until just before maturity, when they are sent direct to banks or express companies for collection and remittance direct to Akron, Ohio.

Thirteenth—Aultman, Miller & Company has never filed a copy of its articles of association in the office of the Secretary

of State of the State of Michigan, or in any other office in Michigan, nor has said company ever paid any franchise fee to the State of Michigan, or in any way complied or attempted to comply with Section 1 of an Act of the Michigan Legislature entitled "An Act to provide for the payment of a franchise fee by corporations," approved July 2, 1891, as amended by Act No. 79 of the Public Acts of Michigan of 1893, approved May 13, 1893. (Public Acts 1891, p. 240; Public Acts 1893, p. 82.)

COPY OF CONTRACT.

This agreement, made this 20th day of February, A. D. 1894, between Aultman, Miller & Co. (a corporation duly incorporated under the laws of the State of Ohio), of Akron, Ohio, of the first part, and Wm. Holder, of Laingsburg, County of Shiawassee, and State of Michigan, of the second part, Witnesseth: That the party of the second part is hereby authorized to sell Buckeye Mowers, Reapers and Binders, and extra parts thereof, in the following territory, viz.: Laingsburg and vicinity and Elsie and vicinity, including the Townships of Washington and Elba, in Gratiot County, Chapin, in Saginaw County, and the west half of Fairfield, in Shiawassee County, for and during the season of 1894, on the following terms and conditions, viz.: The party of the second part agrees:

First—To use all reasonable diligence in canvassing and supplying said territory with said machines, and in maintaining their reputation in preference to any other kind of mowers and combined mowing and reaping machines, and harvesters and binders, and not to convass or solicit orders outside of the above territory.

Second—To sell the said machine at the retail list prices authorized by said first party, with freight and charges from Laingsburg added thereto, on the following terms, viz.: One-half October 1, 1894, one-half October 1, 1895. In extreme cases one-third October 1, 1894, one-third October 1, 1895, one-third October 1, 1896, shall be allowed on binders only, for which

settlement must be made with the purchaser on the delivery of machines; and to grant credit to such persons only as are of well-known responsibility and of good reputation for the payment of their debts; to see that all notes taken for machines sold are drawn on blanks furnished by the said first party, and signed by one or more persons of well-known responsibility; and in all cases of doubt as to the responsibility of the purchaser, to require a mortgage on property, real or personal, amply sufficient to secure a payment in full of all such notes; all notes to bear interest as specified in the blanks provided by first party, and in no instance to run beyond the time above mentioned. And if at any time the party of the first part shall learn that any of said notes were not signed by persons of well-known responsibility, then the party of the second part agrees to redeem all such notes with accrued interest, in cash or approved notes at the option of the party of the first part.

Third—To endorse with waiver of protest and notice of non-payment, all notes given by renters, and parties owning no real estate, unless sufficiently secured by chattel mortgage or otherwise, and all notes which on examination by a banker, or other competent authority, chosen by the first party or its general agent, or pronounced not good or insufficiently secured.

Fourth—That all machines and parts of machines, and all other goods received on commission under this contract, shall be held by the said second party on special storage and deposit as the property of the party of the first part, until converted into notes or money, as herein provided, which notes are to be received by said second party and held on special deposit as the property of said Aultman, Miller & Co., until forwarded to said Aultman, Miller & Co., or delivered to their authorized agent. That in all cases where machines are sold for cash or part cash and notes, all such cash received shall be promptly remitted to Aultman, Miller & Co., Akron, Ohio, or their authorized agent, and that any and all sums of money that may in any case become due and owing from said party of the second part, to said party of the

first part, shall be collectible without any relief whatever from valuation or appraisement laws.

Fifth—To see that all machines sold are properly set up and started, and, as far as possible, that they give satisfaction to the purchaser; and to keep a correct record of sales, showing the name and postoffice address of each purchaser, with price, terms and date of sale; said record of sales to be reported to the party of the first part at its request, and at all times to be subject to the inspection of its general agent.

Sixth—To receive all machines, extras or other goods shipped or delivered on account of said first party; to pay the freight on them, keep them well housed, well cared for, free from taxes, and to insure in a reliable company all goods of every nature on hand that belong to Aultman, Miller & Co., with loss or damage on the same made payable to Aultman, Miller & Co., as their interest in said property may appear, at the time of said loss or damage. To keep all unsold goods well housed and cared for, subject to the order of party of the first part until renewal of this contract, or if necessary up to May 1, 1895, and in no case making charge for handling or storing the same; ordinary freight charges in all cases to follow machines and extras reshipped; but no express charges shall follow goods reshipped, nor shall the party of the first part in any case be obliged to pay express charges on goods shipped to the party of the second part.

Seventh—In furnishing repairs free of charge to customers, to do so only when there is a flaw or defect in the original, and in all cases of repairs so furnished, to have on hand the broken or defective pieces to show at settlement, and to deliver the same to the party of the first part, otherwise bills of this kind will not be allowed; and in no case whatever to take from any machine belonging to the first party any part thereof as extras or repairs; to pay at settlement for all machines on hand, in case of a violation of this clause.

Eighth—To make prompt and accurate reports of machines on hand as often as requested by the first party or its general agent;

to promptly execute orders for transfer of machines, if any are on hand unsold; and in case of failure to make such reports or transfers, to pay said first party for all machines remaining on hand at settlement, unsold by reason of such failure, at the option of said first party.

Ninth—To sell or assist in the sale of no other mowing machines, or combined mowing and reaping machines, or harvesters and binders, in said territory, during the continuance of this contract, and not to purchase, keep in stock or offer for sale binding twine, knives, sickles, sections or other parts of the Buckeye machines manufactured and furnished by any other than the first party.

Tenth—To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time.

Eleventh—To publish a notice of this agency in one or more newspapers in the above named territory during the months of April, May and June, without charge to the first party hereto. To receive and pay transportation charges on all advertising matter forwarded by said first party, and to see that it is properly distributed among the farmers of the above described territory.

The party of the first part further agrees with the party of the second part:

First—To furnish to said second party such machines of the kinds they make as may be wanted to supply said territory, so long as their stock on hand will enable them to fill the orders. No commission will be allowed on orders taken and not filled nor on machines which have for any cause been returned, and in no case shall the party of the second part be entitled to a commission on a sale where the machine has not been delivered and properly set up and started to the satisfaction of the purchaser and settled for. Nor shall any commission whatever be due said second party until a full settlement of account is made; and that the said second party be ready to make settlement on demand of the first party or their authorized agent.

Second—To allow said second party as compensation for receiving, handling, storing, selling, setting up and starting machines, and making collections, whenever required, a commission equal to an amount which, deducted from the price for which the machines have been sold, after deducting other allowances of every nature, will make the net amount to be retained by the said first party in notes and cash in the same proportion as taken for machines sold as follows, freights allowed:

	Width of Cut.	If sold for Cash	If sold for Notes.
Buckeye Light Mower, (one horse)	3 feet 9 in.	$32.00	$34.00 each
Buckeye Light Mower	4 feet 3 in.	33.00	35.00 "
New Buckeye Mower	4 feet 6 in.	34.00	36.00 "
New Buckeye Mower, (to combine)	4 feet 6 in.	.....	..... "
Buckeye Mower	5 feet.	35.00	37.00 "
Buckeye Mower	6 feet.	40.00	42.00 "
New Buckeye Table Rake	5 feet 2 in.	.....	..... "
New Buckeye Dropper	5 feet 2 in.	.....	..... "
.....		.....	..... "
Buckeye Frameless Binder	5 feet.	90.00	90.00 "
Buckeye Frameless Binder	6 feet.	90.00	95.00 "
Buckeye Frameless Binder	7 feet.	.....	..... "
.....		.....	..... "
Buckeye Banner Binder	5 feet 3 in.	90.00	95.00 "
Buckeye Bundle Carrier for Binders.		4.50	..... "
Buckeye Flax and Clover Dump		2.70	..... "
Buckeye Binder Truck, 2-Wheeled.		6.75	..... "

Where an outfit consisting of Binder, Trucks and Bundle Carrier is sold to one person the net cash price shall be $95.00. Time price $95.00 for 5 ft. Machines and $95.00 cash or $100.00 time for 6 ft. Machines.

Third—To furnish the said second party a stock of extra castings and other repairs (excepting knives, sickles, knife and sickle heels, sections, rivets, guards, canvases, pitman ferrules, spring keys, brass boxes, chain links, bolts and other net goods), from the prices of which as found in the published price list a commission of 25 per cent. will be allowed; all such extras sold to be paid for in cash on demand of the first party or their authorized agent.

Fourth—To sell to said second party knives and sickles, and knife and sickle heels, guards, sections and rivets, at a discount of 50 per cent., and pitman ferrules, spring keys, brass boxes, chain links, canvases, bolts and other net goods, at a discount of 50 per cent., all to be paid for in cash on or before the first day of August, 1894.

Fifth—To furnish said second party blank notes, orders, circulars and posters, and such other printed documents as they are accustomed to supply their agents.

Notice.—It is especially agreed that when sales have not been closed by cash or notes on or before delivery as stated above, then the party of the first part may send a person to settle with the purchasers of machines, and the party of the second part shall pay all the expense of making such settlements. It is further agreed that Aultman, Miller & Co. shall not be held liable under any written or printed warranty given by them on their machines that are allowed to go out without first having been settled for.

No canvasser or expert that may be sent to aid you shall have any authority to make any change whatever in our contract with you, and all sales made by him will be subject to your approval or rejection, as no allowance will be made to you for loss of interest or reduction in price on sales made by him. Nor will any promise not authorized in writing by our manager at Lansing, Mich., be recognized at settlement, and the first party reserves the right to rescind or annul this contract at any time that the said party of the second part shall violate or neglect to fulfill any of the above stipulations.

In witness whereof, The parties hereunto have set their hands the day and date above written.

AULTMAN, MILLER & CO.,
By D. C. GILLETT,
WM. HOLDER.

This contract not valid unless countersigned by our manager at Lansing, Mich., and App. at Akron.

Countersigned, Lansing, Mich., Feb. 27, 1894.
R. H. WORTH, Manager.

Across the back of the foregoing contract is the following endorsement: "Approved April 29, 1894. Ira M. Milloy, Secretary."

Aultman, Miller & Co. brought an action of assumpsit in the Circuit Court of the United States for the Eastern District of Michigan to recover from William Holder the amount due it under the contract at the end of the season of 1894, viz., $5,052.56. (Record, pp. 1-6.)

The defendant, in his plea and notice, insisted that the failure of the plaintiff corporation to pay the franchise fee required by the laws of Michigan rendered the contract with him wholly void. (Record, pp. 8-9.)

On a trial before the Hon. Henry H. Swan, District Judge, the court made the findings of fact above set forth, and upon the facts so found, reached the following conclusions, or

FINDINGS OF LAW.

On the above and foregoing findings of facts the Court finds the following conclusions or findings of law:

1. The business of Aultman, Miller & Co., as carried on under and in pursuance of the said contract, is an inter-state commerce business, and said company is not subject to section 1 of the Michigan Franchise Fee Act of 1891, as amended by Act No. 79 of the Public Acts of Michigan of 1893, and said last named act in so far as it applies or purports to apply to foreign corporations like Aultman, Miller & Co. which are doing in Michigan an inter-state commerce business, is in conflict with the provision of the Constitution of the United States authorizing Congress to regulate commerce with foreign nations, and among the several States and with the Indian tribes.

2. Said contract was made and executed in the State of Ohio, and is an Ohio contract, and it does not provide for the transaction of any business in Michigan other than an inter-state commerce business, and the plaintiff is, therefore, within the protection of the Constitution of the United States.

3. Upon the facts found the plaintiff is entitled to recover the sum of $5,052.56 with interest at six per cent. from Nov. 3, 1894, and a judgment will, therefore, be entered in favor of the plaintiff and against defendant for $5,212.56 and costs of suit to be taxed.

HENRY H. SWAN,
District Judge.

(Record, p. 23.)

The defendant, William Holder, brings the case to this court for review on a writ of error.

I.

The Michigan Franchise Fee Act is a revenue or tax law, and not a law for the regulation and control of corporations under the police power of the State.

In Michigan we have taxes that are known as specific State taxes.

Art. XIV of the State Constitution, entitled "Finance and Taxation," contains these provisions:

"Sec. 1. All specific State taxes, except those received from the mining companies of the Upper Peninsula, shall be applied in paying the interest upon the primary school, university and other educational funds," etc.

"Sec. 10. The State may continue to collect all specific taxes accruing to the treasury under existing laws. The Legislature may provide for the collection of specific taxes, from banking, railroad, plank road and other corporations hereafter created."

"Sec. 11. The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

At the time the present Constitution of the State was adopted, in 1850, and ever since then the statutes of the State have provided for the collection of specific State taxes from corporations.

Rev. Stat. of Mich., 1846, p. 121.
1 How. Stat. of Mich., 1882, p. 366.

The franchise fee tax is a substantial one. A corporation with an authorized capital of $100,000 is required to pay $50, and one with an authorized capital of $1,000,000 is required to pay $500.

II.

The Michigan business of Aultman, Miller & Co. is an interstate commerce business and nothing else.

In support of this proposition we rely upon the following facts:

1. The binders and mowers and their extras, or repairs, shipped by Aultman, Miller & Co. to their local agents in Michigan remain the property of the company until actually sold to a purchaser, and the money or notes received from the purchaser, are received by the local agent as the money or notes of Aultman, Miller & Co.

2. The binders and mowers and their extras and repairs when stored in the company's warehouse in Lansing, and when in the possession of the local agents of the company are simply in transit from the factory of the company in Ohio, to those who have or may become the purchasers of the same, and until sold and delivered to a purchaser they do not become commingled with and a part of the property in the State.

Both of these things are required by the fourth subdivision of the contracts between the company and its local agents. (Record, p. 20.)

The cases in this court upon which we rely are the following:

Brown vs. Maryland, 12 Wheat., 419.
Robbins vs. Shelby Taxing District, 120 U. S., 489.
Asher vs. Texas, 128 U. S., 129.
Leisy vs. Hardin, 135 U. S., 100.
Lyng vs. Michigan, 135 U. S., 161.
Brennan vs. Titusville, 153 U. S., 289.
Covington, etc., Bridge Co. vs. Kentucky, 154 U. S., 204.

In the two cases last cited this court had occasion in able and learned opinions prepared by Mr. Justice Brewer and Mr. Justice Brown respectively, to make an exhaustive and authorita-

tive examination of the prior cases, and a final exposition of the commercial clause of the Constitution.

In Covington, etc., Bridge Co. v. Kentucky, 154 U. S., 204, it appeared that the bridge company was a corporation created by the concurrent action of the States of Kentucky and Ohio for the purpose of constructing and maintaining a bridge across the Ohio river for the purposes of public travel between the two States. The company was authorized by the original acts of incorporation to fix the rates of toll for passing over the bridge, but it was required from time to time to reduce the rates of toll so that the net profits of the bridge should not exceed fifteen per cent. per annum.

After the bridge had been in use many years the Legislature of Kentucky passed an act fixing rates of toll much less than those fixed by the company, and which it was estimated would reduce its net profits to less than two per cent. per annum.

Four of the judges of the Supreme Court of the United States held that the original acts of incorporation constituted a contract between the corporation and both States which could not be altered by the one State without the consent of the other.

The majority of the court, however, in an opinion delivered by Mr. Justice Brown, based their decision on the commercial clause of the Constitution, and held:

(1) That the traffic across the river was inter-state commerce;

(2) That the bridge was an instrument of such commerce;

(3) That the statute was an attempted regulation of such commerce which the State had no constitutional power to make;

(4) That Congress alone possesses the requisite power to enact a uniform scale of charges in such a case, the authority of the State being limited to fixing tolls on such channels of commerce as are exclusively within its territory.

The following are instructive extracts from the opinion, the authorities cited being omitted:

"The power of Congress over commerce between the States and the corresponding power of individual States over such com-

merce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the States with respect thereto are so well defined that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarcation between the powers belonging exclusively to Congress, and those in which the action of the State may be concurrent. The adjudications of this court with respect to the power of the States over the general subject of commerce are divisable into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all.

"The first class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect inter-state commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference.

"Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots; quarantine and inspection laws and the policing of harbors; the improvement of navigable channels; the regulation of wharfs, piers, and docks; the construction of dams and bridges across the navigable waters of a State; and the establishment of ferries.

"Of this class of cases it was said by Mr. Justice Curtis: 'If it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it

is not the mere existence of such a power, but its exercise by Congress, which may be incompatiable with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations.'

"But even in the matter of building a bridge, if Congress chooses to act, its action necessarily supersedes the action of the State. As matter of fact, the building of bridges over waters dividing two States is now usually done by congressional sanction. Under this power the States may also tax the instruments of inter-state commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

"But wherever such laws, instead of being of a local nature and not affecting inter-state commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and this case falls within the third class—of those laws wherein the jurisdiction of Congress is exclusive. Subject to the exceptions above specified, as belonging to the first and second classes, the States have no right to impose restrictions, either by way of taxation, discrimination, or regulation upon commerce between the States. That, while the States have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several States, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities."

In Brennan v. Titusville, 153 U. S., 289, the court held an ordinance of the city of Titusville, Pa., invalid because it was in conflict with the commercial clause of the Constitution of the United States.

The ordinance was as follows:

"That all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the said treas-

urer therefor the following sums, according to the time for which said license shall be granted, viz.: For one day, $1.50; one week, $5.00; three months, $10.00; one year, $25.00; provided, that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers residing and doing business in said city."

Mr. Justice Brewer, in delivering the opinion of the court, first made the following comments on the case:

"The question in this case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one State can send an agent into another State to solicit orders for the products of his manufactory without paying to the latter State a tax for the privilege of thus trying to sell his goods.

"It is true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the State can tax for the privilege of selling to one class, it can for selling to another, or to all. In either case it is a restriction on the right to sell, and a burden on lawful commerce between the citizens of two States. It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is surely a regulation of commerce. It must be borne in mind that the goods which the defendant was engaged in selling, to-wit, pictures and picture frames, are open to no condemnation, and are unchallenged subjects of commerce. There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to health, morals, or general welfare of the community. It must also be borne in mind that the ordinance is not one designed to protect from imposition and wrong either minors, habitual drunkards, or persons under any other affliction or disability. There is no dis-

crimination except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants, it cannot be for the privilege of selling to the rest of the community. The same observation may also be made in respect to the places and manner in which the sales were charged to have been made. It is as much within the scope of the police power to restrain parties from going to a store or manufactory as from going to a dwelling house for the purposes of making sale. We do not mean to say that none of these matters to which we have referred are within the reach of the police power; but simply that the conditions on the one side are no more within its reach than those on the other, so that if, under the excuse of an exercise of the police power, this ordinance can be sustained, and sales in the manner therein named be restricted, by an equally legitimate exercise of that power almost any sale could be prevented."

Justice Brewer next discussed the question whether the Titusville ordinance could be sustained as an exercise of the police power, and among other things he said:

"Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects inter-state commerce, can be sustained. It is undoubtedly true that there are many police regulation which no affect inter-state commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon inter-state commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of inter-state commerce is equivalent to a declaration on its part that it should be absolutely free.

"That this license tax is a direct burden on inter-state commerce is not open to question."

After referring to some of the cases he continued:

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in inter-state commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of exaction until all inter-state commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of inter-state commerce is committed by the Constitution of the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent regulate it."

This learned judge then proceeds to make the following instructive comments on the prior decisions of the court. We quote these comments in full because they contain an authoritative analysis of the prior cases:

"These questions of interference by State regulations with inter-state commerce have been frequently before this court, and it may not be unwise to examine a few of them. Welton v. State of Missouri, 91 U. S., 275, presented these facts: Welton was indicted and convicted for acting as a peddler under a statute defining a peddler to be one 'going from place to place to sell' goods not the growth, produce, or manufacture of the State, and prohibiting anyone from peddling without a license. The conviction was set aside by this court. It is true that the case turned largely upon the fact of discrimination between products of other States and those of Missouri, but nevertheless the decision is an adjudication that the imposition of a license tax on the peddling of goods is a regulation of commerce.

"Robbins v. Shelby Taxing District, 120 U. S., 489, was a case closely in point. Robbins was engaged in soliciting in the city of Memphis, Tenn., the sales of goods for a Cincinnati firm, exhibiting samples for the purpose of affecting such sales, his employment being that which is usually denominated that of a drummer. This business was declared by a statute of Tennessee to be a privilege for which a license tax was required. Robbins

was convicted of a violation of that statute. The statute made no discrimination between those who represented business houses out of the State and those representing like houses within the State. There was, therefore, no element of discrimination in the case, but, nevertheless, the conviction was set aside by this court on the ground that whatever the State might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the State, it could not impose upon those who acted as drummers for business houses outside of the State (and who were, therefore, engaged in inter-state commerce) any burden by way of a license tax. The opinion by Mr. Justice Bradley is elaborate and enters fully into a discussion of the question, citing many authorities. It asserts in the strongest language the exclusive power of Congress over inter-state commerce; that its failure to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and whatever may be the extent to which the police power of the State can go, it cannot go so far as to uphold any regulations directly affecting inter-state commerce.

"In the case of Leloup v. Mobile, 127 U. S., 640, a license tax sought to be imposed by the State upon a telegraph company engaged in inter-state commerce, was declared beyond the power of the State.

"Asher v. Texas, 128 U. S., 129. In that case, a statute requiring from 'every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax of $35' was declared inoperative so far as it affected one soliciting orders for a business house in another State, and the case of Robbins v. Shelby Taxing District was expressly reaffirmed.

"The same doctrine was applied in Stoutenburgh v. Hennick, 129 U. S., 141, to the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license there, as required by an act of the legislative assembly of the District of Columbia.

"In Lyng v. Michigan, 135 U. S., 161, 166, it was said: 'We have repeatedly held that no State has the right to lay a tax on inter-state commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.'

"In McCall v. California, 136 U. S., 104, 111, it appeared that McCall was an agent in San Francisco, California, engaged in soliciting business for an eastern railroad corporation, but not engaged in selling tickets for that company, or receiving or paying out money on its account, yet it was held that he was engaged in inter-state commerce, and the license tax imposed upon him for the privilege of doing such business was unconstitutional. Mr. Justice Lemar, reviewing the prior cases and replying to the objection that this only indirectly affected the commerce of the road, said: 'The test is: Was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it envolves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent.'

"In Crutcher v. Kentucky, 141 U. S., 47, 61, an act of the State of Kentucky which forbade the agent of an express company, not incorporated by the laws of that State, from carrying on business without first obtaining a license from the State, and, as preliminary thereto, that he should satisfy the Auditor of the State that the company he represented was possessed of an actual capital of at least $150,000, was held to be a regulation of commerce and invalid. Mr. Justice Bradley, speaking for the court, observed: 'The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulation of inter-state commerce which may have been expressly or im-

pliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon inter-state commerce any more than upon foreign commerce, and that all acts of legislation producing any such result are, to that extent, unconstitutional and void.' "

Justice Brewer stated the conclusion of the court as to the validity of the Titusville ordinance as follows:

"Within the reasoning of these cases it must be held that the license tax imposed upon the defendant was a direct burden on inter-state commerce, and was, therefore, beyond the power of the State."

Some of the State Supreme Courts have made decisions in accord with the position of the defendant in error in the present case.

Gunn vs. Machine Co., 57 Ark., 24.
Allen vs. Tyson-Jones Buggy Co., 40 S. W. Rep. (Tex.), 393, 714.
Miller vs. Goodman, 40 S. W. Rep. (Tex.), 718.
Shaw Piano Co. vs. Ford, 41 S. W. Rep. (Tex.), 198.
State vs. O'Connor, 5 N. Dak., 629.
McNaughton Co. vs. McGirl, 49 Pac. Rep. (Mont.), 651.

These cases as to the facts are very similar, if not substantially identical, with the case at bar.

A cigarette original package case.

State vs. McGregor, 76 Fed. Rep., 956.

III.

The cases in this court where State regulations that interfered with inter-state commerce have been sustained as a proper exercise of the police power of the State have no application to this case.

Emert vs. Missouri, 156 U. S., 296, is the leading case of this class. It involved the validity of a statute requiring peddlers to take out a license.

In the more recent case of N. Y., N. H. & H. R. vs. New York, 165 U. S., 628, 631, Mr. Justice Harlan, speaking for the court, cited a number of cases in connection with the following proposition:

"According to numerous decisions of this court (some of which are cited in the margin) sustaining the validity of State regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign nations, it was clearly competent for the State of New York, in the absence of national legislation covering the subject, to forbid, under penalties, the heating of passenger cars in that State by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in inter-state commerce."

We respectfully submit that the judgment below should be affirmed, with costs.

FRED A. BAKER,
Attorney for Defendant in Error.

OLIN L. SADLER,
JOHN A. BRADLEY,
Of Counsel.

No. 109.

Brief of Maynard for State of Mich

The Supreme Court of the United States.

Filed Nov. 18, 1897.

OCTOBER TERM, 1897.

No. 109.

WILLIAM HOLDER,
Plaintiff in error,
vs.
AULTMAN MILLER & COMPANY,
Defendant in error.

Brief of Fred A. Maynard, Attorney General of the State of Michigan.

16,158.

A. VAN DORT
RECORD AND BRIEF PRINTER, GRAND RAPIDS, MICH.
1897

The Supreme Court of the United States.

OCTOBER TERM, 1897.

WILLIAM HOLDER,
Plaintiff in error,
vs.
AULTMAN MILLER & COMPANY,
Defendant in error.

No. 109.

Brief of Fred A. Maynard, Attorney General of the State of Michigan.

This brief is filed on behalf of the State of Michigan, by the Attorney General of that State, in pursuance of an order of the court, permitting him to file a brief.

The State has not been made a party to the suit, which is apparently a controversy between the defendant in error, and its agent, the plaintiff in error, over certain moneys which appear to belong to and be the property of the said defendant, and which said agent has collected and holds, and apparently refuses to pay or deliver over to his principal, to whom it rightfully belongs.

Under this so-called controversy, the counsel, and court below, seem to have made a departure from the case as presented, and have discussed, and undertaken to decide upon the validity of an important Michigan statute relating to the regulation of foreign

corporations doing business tn said State, the filing of articles of incorporation, etc., and the payment of a franchise fee.

The laws of Michigan relating to the incorporation of manufacturing companies were revised in 1885, the revision providing for the incorporation of stock companies for the purpose of carrying on any manufacturing or mercantile business. or any union of the two.

Session laws of Mich. 1885, page 343.
3 Howell's Statutes Sec. 4161a, page 3387.

In 1889, a section was added to said law providing for the qualification under said law of foreign corporations.

Session Laws of Mich. 1889, page 195.
3 Howell's Statutes, Sec, 4161 d 6, page 3397.

Said section reads as follows.

"Sec. 37. Corporations organized under the laws of any State of the Union, or of any foreign country, either wholly or in part for any of the purposes contemplated by this act, upon recording copies of their charter, or articles of incorporation, or memoranda of association, as provided in section nine of this act, and upon filing in the office of the Secretary of State a resolution, as required in general section forty-three hundred and thirty-one of Howell's Annotated Statutes and appointing an agent for service of process, may, for such purposes, carry on business in this State, and shall enjoy all the rights and privileges, and be subject to all the restrictions and liabilities of corporations existing under this act."

In 1891 the legislature passed a law requiring corporations thereafter organized in Michigan to pay a

franchise fee on filing their articles.

Session Laws 1891, page 240.

In 1893, section one of said act was amended in such a way as to give it application to foreign corporations, and also providing as follows:

> "All contracts made in this State after the first day of January, eighteen hundred and ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly void."

The entire of said section, as annexed, reads as follows:

> "Section 1. The people of the State of Michigan enact, That every corporation or association hereafter incorporated or formed by consolidation or otherwise, by or under any general or special law of this State, which is required by law to file articles of association with the Secretary of State, and every foreign corporation or association which shall hereafter be permitted to transact business in this State (which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein), shall pay to the Secretary of State a franchise fee of one-half of one mill upon each dollar of the authorized capital stock of said corporation or association, and a proportionate fee upon any and each subsequent increase thereof; and that every corporation heretofore orginized or doing business in this State which shall hereafter increase the amount of its authorized capital stock, shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association, and a proportionate fee upon

any and each subsequent increase thereof: Provided, that the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorporated under the law of this State, or foreign corporation authorized to do business in this State, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the first day of January, eighteen hundred and ninety-four, by any corporation which has not first complied with the provisions of this act shall be wholly void."

Session Laws of Mich., 1893, page 82.

The record shows that the defendant in error did business such as is mentioned in said laws, without ever complying in any way with any of said laws, and without paying any franchise fee, and made the contract with plaintiff in error after the said law of 1893 took effect.

The following are the finding of facts and the contract as set forth in the record:

Findings of Facts.

First—On the 29th day of April, 1894, the parties to this suit entered into a written contract, a copy of which, marked "Copy of Contract," is hereinafter set forth. Said contract was executed, accepted and approved as set forth in said contract, and in the endorsement on the back thereof.

Second—The provisions of said contract, in so far as plaintiff is concerned, have been fulfilled,

Third—There is a balance due the plaintiff from defendant under said contract of five thousand and fifty-two and fifty-six hundredths dollars ($5,052.56).

Fourth—Aultman, Miller & Company is a corporation organized and existing under the general laws of Ohio, having its corporate office in the City of Akron, County of Summit and State of Ohio, and having its manufactory at the same place.

Fifth—Aultman, Miller & Company do not manufacture any goods whatever within the State of Michigan.

Sixth—Aultman, Miller & Company sells its goods in Michigan by means of local commission agents, and it has a general agent at the City of Lansing, in Michigan, and its commission agents are under similar contracts with the plaintiff to the one set forth in this action.

Seventh—All contracts are sent to Aultman, Miller & Company at Akron, for approval or rejection, before taking any effect.

Eight—The goods sold by Aultman, Miller & Company in the State of Michigan, and manufactured at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agents. forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent, or in bulk to Lansing or various points throughout the State, and re-shipped in smaller lots direct to the commission agent.

Ninth—Aultman, Miller & Company own a warehouse in the City of Lansing for the transfer of such re-shipments, for the temporary storage of a small stock of extras or repairs, which experience has shown may be suddenly needed by customers throughout the State during the harvest season. A portion of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of

their customers. These are partially commission goods and partially goods sold direct to them.

Tenth—Accounts with every commision agent in the State of Michigan are kept at the office of the plaintiff in Akron, Ohio.

Eleventh—The Plaintiff effects settlements with its commission agents by sending to its general agent copies or statements of all such accounts. The general agent and his assistants check over the season's work with the commission agent, collect pay for the machines sold, in notes or cash, or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and the notes so taken are subject to the approval or rejection of the plaintiff.

Twelfth—All notes taken by the commission agents of Aultman, Miller & Company are sent through its general agent at Lansing to the factory at Akron, Ohio, where they are numbered, recorded, filed and retained until just before maturity, when they are sent direct to banks or express companies for collection and remittance direct to Akron, Ohio.

Thirteenth—Aultman, Miller & Company has never filed a copy of its articles of association in the office of the Secretary of State of the State of Michigan, or in any other office in Michigan, nor has said company ever paid any franchise fee to the State of Michigan, or in any way complied or attempted to comply with Section 1 of an Act of the Michigan Legislature entitled "An Act to provide for the payment of a franchise fee by corporation," approved July 2, 1891, as amended by Act No. 79 of the Public Acts of Michigan of 1893, approved May 13, 1893. (Public Acts 1891, p. 240; Public Acts 1893, p. 82.)

COPY OF CONTRACT.

This agreement, made this 20th day of February, A. D. 1894, between Aultman, Miller & Co. (a corporation duly incorporated under the laws of the State of Ohio), of Akron, Ohio, of the first part, and Wm. Holder, of Laingsburg, County of Shiawassee, and State of Michigan, of the second part, Witnesseth: That the party of the second part is hereby authorized to sell Buckeye Mowers, Reapers and Binders, and extra parts thereof, in the following territory, viz.: Laingsburg and vicinity and Elsie and vicinity, including the Townships of Washington and Elba, in Gratiot County, Chapin, in Saginaw County, and the west half of Fairfield, in Shiawassee County, for and during the season of 1894, on the following terms and conditions, viz.: The party of the second part agrees:

First—To use all reasonable diligence in canvassing and supplying said territory with said machines, and in maintaining their reputation in preference to any other kind of mowers and combined mowing and reaping machines, and harvesters and binders, and not to convass or solicit orders outside of the above territory.

Second—To sell the said machine at the retail list prices authorized by said first party, with freight and c arges from Laingsburg added thereto, on the following terms, viz.. One-half October 1, 1894, one-half October 1, 1895. In extreme cases one-third October 1, 1894, one-third October 1, 1895, one-third October 1, 1896, shall be allowed on binders only, for which settlement must be made with the purchaser on the delivery of machines; and to grant credit to such persons only as are of well-known responsibility and of good reputation for the payment of their debts; to see that all notes taken for machines sold are drawn on blanks furnished by the said first party, and signed by one or more per-

sons of well-known responsibility; and in all cases of doubt as to the responsibility of the purchaser, to require a mortgage on property, real or personal, amply sufficient to secure a payment in full of all such notes; all notes to bear interest as specified in the blanks provided by first party, and in no instance to run beyond the time above mentioned. And if at any time the party of the first part shall learn that any of said notes were not signed by persons of well-known responsibility, then to party of the second part agrees to redeem all such notes with accrued interest, in cash or approved notes at the option of the party of the first part.

Third—To endorse with waiver of protest and notice of nonpayment, all notes given by renters, and parties owning no real estate, unless sufficiently secured by chattle mortgage or otherwise, and all notes which on examination by a banker, or other competent authority, chosen by the first party or its general agent, or pronounced not good or insufficiently secured.

Fourth—That all machines and parts of machines, and all other goods received on commission under this contract, shall be held by the said second party on special storage and deposit as the property of the party of the first part, until converted into notes or money, as herein provided, which notes are to be received by said second party and held on special deposit as the property of said Aultman, Miller & Co., until forwarded to said Aultman, Miller & Co., or delivered to their authorized agent. That in all cases where machines are sold for cash or part cash and notes, all such cash received shall be promply remitted to Aultman, Miller & Co., Akron, Ohio, or their authorized agent, and that any and all sums of money that may in any case become due and owing from said party of the second part, to

said party of the first part, shall be collectible without any relief whatever from valuation or appraisment laws.

Fifth—To see that all machines sold are properly set up and started, and, as far as possible, that they give satisfaction to the purchaser, and to keep a correct record of sales, showing the name and post-office address of each purchaser, with price, terms and date of sale; said record of sales to be reported to the party of the first part at its request, and at all times to be subject to the inspection of its general agent.

Sixth—To receive all machines, extras or other goods shipped or delivered on account of said first party; to pay the freight on them, keep them well housed, well cared for, free from taxes, and to insure in a reliable company all goods of every nature on hand that belong to Aultman, Miller & Co., with loss or damage on the same made payable to Aultman, Miller & Co., as their interest in said property may appear, at the time of said loss or damage. To keep all unsold goods well housed and cared for, subject to the order of party of the first part until renewal of this contract, or if necessary up to May 1, 1895, and in no case making charge for handling or storing the same; ordinary freight charges in all cases to follow machines and extras reshipped; but no express charges shall follow goods reshipped, nor shall the party of the first part in any case be obliged to pay express charges on goods shipped to the party of the second part.

Seventh—In furnishing repairs free of charge to customers, to do so only when there is a flaw or defect in the original, and in all cases of repairs so furnished, to have on hand the broken or defective pieces to show at settlement, and to deliver the same to the party of the first part, otherwise bills of this kind will not be allowed; and in no case whatever to take from any machine

belonging to the first part any part thereof as extras or repairs; to pay at settlement for all machines on hand, in case of a violation of this clause.

Eighth—To make prompt and accurate reports of machines on hand as often as requested by the first party or its general agent; to promptly execute orders for transfer of machines, if any are on hand unsold; and in case of failure to make such reports or transfers, to pay said first party for all machines remaining on hand at settlement, unsold by reason of such failure, at the option of said first party.

Ninth—To sell or assist in the sale of no other mowing machines, or combined mowing and reaping machines, or harvesters and binders, in said territory, during the continuance of this contract, and not to purchase, keep in stock or offer for sale binding twine, knives, sickles, sections or other parts of the Buckeye machines manufactured and furnished by any other than the first party.

Tenth—To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time.

Eleventh—To publish a notice of this agency in one or more newspapers in the above named territory during the months of April, May and June, without charge to the first party hereto. To receive and pay transportation charges on all advertising matter forwarded by said first party, and to see that it is properly distributed among the farmers of the above described territory.

The party of the first part further agrees with the party of the second part:

First—To furnish to said second party such machines of the kinds they make as may be wanted to supply said territory, so long as their stock on hand will enable

them to fill the orders. No commission will be allowed on orders taken and not filled, nor on machines which have for any cause been returned, and in no case shall the party of the second part be entitled to a commission on a sale where the machine has not been delivered and properly set up and started to the satisfaction af the purchaser and settled for. Nor shall any commission whatever be due said second party until a full settlement of account is made; and that the said second party be ready to make settlement on demand of the first party or their authorized agent.

Second—To allow said second party as compensation for receiving. handling, storing, selling, setting up and starting machines, and making collection, whenever required, a commission equal to an amount which, deducted from the price for which the machines have been sold, after deducting other allowances of every nature, will make the net amount to be returned by the first party in notes and cash in the same proportion as taken for machines sold as follows, freights allowed:

	Width of Cut.	If sold for Cash.	If sold for Notes.
Buckeye Light Mower, (one horse)	3 feet 9 in.	$32.00	$34.00 each
Buckeye Light Mower	4 feet 3 in.	33.00	35 00 "
New Buckeye Mower	4 feet 6 in.	34.00	36.00 "
New Buckey Mower (to combine)	4 feet 6 in.	.....	..... "
Buckey Mower	5 feet.	35.00	37.00 "
Buckeye Mower	6 feet.	40 00	42.00 "
New Buckeye Table Rake	5 feet 2 in.	.....	..... "
New Buckeye Dropper	5 feet 2 in.	.....	..... "
.....		....	..... "
Buckeye Frameless Binder	5 feet.	90.00	90.00 "
Buckeye Frameless Binder	6 feet.	90.00	95.00 "
Buckeye Frameless Binder	7 feet.	.....	..... "
.....		.....	.... .. "
Buckey Banner Binder	5 feet 3 in.	90.00	95.00 "
Buckey Bundle Carrier for Binders		4.50	..... "
Buckey Flax and Clover Dump		2.70	..... "
Buckeye Binder Truck, 2 Wheeled		6.75	..... "

Where an outfit consisting of Binder. Trucks and Bundle Carrier is sold to one person the net cash price shall be $95.00. Time price $95 00 for 5 feet Machines and $95.90 cash or $100.00 time for 6 ft. Machines.

Third—To furnish the said second party a stock of extra castings and other repairs (excepting knives, sickles, knife and sickle heels, sections, rivets, guards, canvases, pitman ferrules, spring keys, brass boxes, chain links, bolts and other net goods), from the prices of which as found in the published price list a commission of 25 per cent, will be allowed, all such extras sold to be paid in cash on demand of the first party or their authorized agent.

Fourth—To sell to said second party knives and sickles, and knife and sickle heels, guards, sections and rivets, at a discount of 50 per cent., and pitman ferrules, spring keys, brass boxes, chain links, canvases, bolts and other net goods, at a discount of 50 per cent., all to be paid for in cash on or before te first day of August, 1894.

Fifth—To furnish said second party blank notes, orders, circulars and posters, and such other printed documents as they are accustomed to supply their agents.

Notice.—It is especially agreed that when sales have not been closed by cash or notes on or before delivery as stated above, then the party of the first part may send a person to settle with the purchasers of machines, and the party of the second part shall pay all the expenses of making such settlements. It is further agreed that Aultman, Miller & Co. shall not be held liable under any written or printed warranty given by them on their machines that are allowed to go out without first having been settled for.

No canvasser or expert that may be sent to aid you shall have any authority to make any charge whatever in our contract with you, and all sales made by him will be subject to your approval or rejection, as no allowance will be made to you for loss of interest or

reduction in price on sales made by him. Nor will any promise not authorized in writing by our manager at Lansing, Mich., be recognized at settlement, and the first party reserves the right to rescind or annul their contract at any time that the said party of the second part shall violate or neglect to fulfill any of the above stipulations.

In witness whereof, The parties hereunto have set their hands the day and date above written.

AULTMAN, MILLER & CO.,
By D. C. GILLETT,

This contract not valid unless countersigned by our manager at Lansing, Mich., and App. at Akron. WM. HOLDER.

Countersigned, Lansing, Mich., Feb. 27, 1894.
R. H. WORTH, Manager.

Across the back of the foregoing contract is the following endorsement: "Approved April 29, 1894. Ira M. Miller, Secretary."

Upon such finding of facts, the court made the following findings of law:

FINDINGS OF LAW.

On the above and foregoing findings of facts, the court finds the following conclusions or findings of law:

1. The business of Aultman, Miller & Co., as carried on under and in pursuance of the said contract, is an inter-state commerce business, and said company is not subject to section 1 of the Michigan Franchise Free Act of 1891, as amended by Act. No. 79 of the Public Acts of Michigan of 1893, and said last named act in so far as it applies or purports to apply to foreign corporation like Aultman, Miller & Co. which are doing in Michigan an inter-state commerse business, is in conflict with the provision of the Constitution of the

United States authorizing Congress to regulate commerce with foreign nations, and among the several States and with the Indian tribes.

2. Said contract was made and executed in the State of Ohio, and is an Ohio contract, and it does not provide for the transaction of any business in Michigan other than an interstate commerce business, and the plaintiff is, therefore, within the protection of the Constitution of the United States.

3. Upon the facts found the plaintiff is entitled to recover the sum of $5,052.56 with interest at six per cent. from Nov. 3, 1894, and a judgment will, therefore, be entered in favor of the plaintiff and against defendant for $5,212.56 and costs of suit to be taxed.

HENRY H. SWAN,
District Judge.

(Record, p. 23.)

First.

Upon this record it is now claimed, on behalf of the State of Michigan, that the questions relating to the validity and application of the said Michigan laws as stated and found by the court below in the findings of law, were not properly before the court, and are not now properly before the Supreme Court for its decision.

a.

The money sought to be recovered in this case, appears to be the money of the defendant in error, collected by the plaintiff in error as its agent.

The title and ownership of the money was in the former all of the time, and an action in tort might have been maintained for its wrongful conversion under the facts as they appear.

The statutes of Michigan, above referred to do not

purport to countenance or excuse embezzlement by an agent, or any tortious acts whatever by the agents of foreign corporations.

In the case of People vs. Hawkins, 106 Mich. 479, it was expressly held, that under similar circumstances, the money was the property of the principal, and that the agent was properly convicted of embezzlement.

In that case, the Standard Oil Company of Ohio, a foreign corporation, for several years did business in Michigan, having a general office in Detroit, through which its business, for a portion of the state was done. This business was principally done in selling petroleum to customers in this state. The oil was, as a rule shipped to Detroit in tank and other cars and then stored until sold, being then re-shipped. All money received for sales of oil in that portion of the state was sent to the Detroit office, and came to the hands of defendant, who was book-keeper and assistant cashier. He was convicted of embezzling $2600 of the company's money.

After discussing the question of the validity and application of contracts in Michigan by said foreign corporation the court used the following language:

> "But, if it should be held that the act under consideration was prohibitive, and that the company could not make or enforce contracts, it would not follow that this defendant could not be guilty of embezzlement. In fact, he was the agent of the company, whether it was a lawful enterprise or engagement or not.
>
> By virtue of his relation, he became possessed of property which was not his, and which belonged to the company, if to anybody. He acted for, and permitted himself to be held out as the agent of, the company, and received money from var-

> ious persons who were willing to pay. He was a de-facto servant, and it is unnecessary that his relation should have grown out of a lawful contract of agency. It was enough if he acted, and was permitted to act as such."

The money of the company being in the hands of the agent, if the latter refused to pay it over, it may be recovered, without regard to the question whether the original contract of agency was valid or not.

In connection with the above question see the case of

Benefit Society v. Lester, 105 Mich. 716,

where it was held, that a foreign mutual benefit society, which had not complied with the laws of Michigan as conditions for permission to do business in this state, and was forbidden under a penalty from doing business therein, made assessments upon members residing in Michigan, which assessments were by such members voluntarily paid to the agent of said society, who also resided in Michigan, and the agent on demand refusing to pay over such moneys to said society which brought suit in the state court against the agent for such moneys, could not recover such moneys.

In its decision the court used the following language:

> "Under the statute, How. Stat. §8136, the plaintiff is not authorized to maintain this action because the collection of this money 'arose out of' acts of the plaintiff which were forbidden, viz: the doing business and issuing certificates to citizens and residents of Michigan, and the collection of assessments by its agents within the state. See Seamans v. Temple Co. supra. Such collection was the "transaction of the business of insurance. How. Stat. §§4225, 4227, 4244."

The said section 8136 of Howell's Statutes, referred to in the said opinion, is as follows:

"But when, by the laws of this state, any act is forbidden to be done by any corporation or by any association of individuals, without express authority by law and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act."

It is suggested that there would be this difference between the said last named case, and the People v. Hawkins (above mentioned) as well as the case at bar, that in the former the title and ownership of the money had not passed to the society, while in the latter cases, the title and ownership of the moneys was in the said corporations, respectively.

There still remain the questions whether said statute prohibiting any action arising out of a prohibited act, would apply to the case at bar, and if so whether the federal courts are bound by said statute.

b.

The agent having, by means of his employment, obtained and received into his possession the moneys of his principal, is estopped from asserting the invalidity of the contract whereby he became agent.

The State of Michigan not being a party to this suit, would not be bound by the adjudication made. The State has had no opportunity to be represented at the trial and production of evidence. And if a decision is to be made upon the validity and application of the said statutes, it should only be done when it becomes necessary to the disposition of the case before the court.

Here, in this case, the questions as to the validity

and application of those statutes, are not involved, and the case can be disposed of on the grounds above set forth.

Second.

If the court holds that the question involving the validity and application of the Michigan Statute referred to, is involved in this case, then it is submitted, that the business done by the defendant in error was not commerce between the States, but was doing business in the State of Michigan beyond the scope of interstate commerce laws, and within the condemnation of the Michigan Statutes of 1893.

By the decisions already made, it appears, that when a foreign corporation, sells its goods by an itinerant agent, who takes orders and reports to the house and ships the goods to the purchaser, that such business is protected by the laws relating to commerce between the States.

See Coit & Co. vs. Sutton, 102 Mich. 324, where the following language is used; referring to Act 79 of the laws of Mich. 1893.

> "The law in question imposes a tax upon corporations for the privilege of doing business in Michigan. It is a tax upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid, which, if enforced, would embarrass plaintiff in its commerce with inhabitants of Michigan. It must therefore be held that the act in question does not apply to foreign corporations whose business within this State consists merely of sel-

ling through itinerant agents, and delivering commodities manufactured outside of this State."

See also, Kindel v. Beck &c. Co., 35 Pac. R. 538
Gunn v. Machine Co. 57 Ark. 24.

The case at far is different in its facts from such cases.

In the case at bar the defendant in error established warehouses, and depots for storage of its goods, and exhibiting its goods and machines to purchasers.

In other words these warehouses were branches of their general plant or place of business.

The defendant in error was engaged in the business of manufacturing and selling goods.

Its factory was in the State of Ohio; but the mercantile portion of its business, so far as Michigan was concerned, was done by branch houses, and especially by its branch house in the City of Lansing, where a large warehouse was kept and used for the purpose of storing and exhibiting goods and making sales, as well as to supply goods to other local branches established in different parts of the State.

It appears that all the business that could be done by any wholesale or retail mercantile house or store was carried on at such warehouse in Lansing.

Present sales of goods in the warehouse were made in the same manner, as ordinary retail sales are made for cash or on credit.

There were also kept for sale, and to furnish local agents to sell, a large quantity of extra pieces of machinery, and a general depot of material for repairs of the machines sold. The nature of the machines being such, that in order to keep them running as contemplated in the purposes for which they were sold, constant repairs were necessary, and such repairs could best be done by having manufactured pieces of

machinery to put in place of defective, broken or worn out parts of the machine sold.

This was an essential part of the business of defendant in error.

At Lansing it kept a stock of such extra parts of the machines. And this business so done, was as much business exclusively done in Michigan, as if the factory, or a branch factory, were located in Lansing, and the goods there made.

The mercantile part of the business was as important as the manufacturing.

Such business as was done by defendant in error in Michigan differs widely from merely selling their goods by itinerant agents, who takes orders by samples and send their orders to their principals in other states, which principals then ship their goods direct to the customers.

The case of

American Harrow Co. v. Shaffer, 68 Fed. Rep. 750

is similar to the case at bar as to the principal points involved.

The laws of Virginia required every agent who sold manufactured articles in that state should take out a license and pay a license fee, and it applied to residents and non-residents alike.

The complainant was a corporation organized in the State of Michigan, where it manufactured a combined harrow, cultivator and seeder; and sent its agents into Wythe County, Va., to sell said implements. In doing this the said complainants sent their implements by the car load to said county in Virginia, where they were stored in a building in Wytheville. That the agents took the harrows in wagons through the county and sold and delivered them for cash or on credit. Upon the license tax being demanded by the defendant

who was the commissioner of the revenue for Wythe County, Va., the complainants' agents refused to pay it, and suit being begun in the Circuit Court of Wythe County, to collect the tax, the complainant filed its bill of complaint in the U. S. Circuit Court, asking for an injunction restraining the commissioner from collecting the tax, claiming its right to dispose of the goods in the manner stated under the inter-state commerce law.

The federal court dissolved the injunction, and in deciding the case, used the following language:

> "Applying the principles, so distinctly stated in these decisions, to the facts of this case, no other conclusion can be reached than that the agents of complainant were not engaged in selling harrows by sample, taking orders therefor, the orders to be sent to their principal in the state of Michigan, and the harrows so sold on orders forwarded to the purchasers. Had this been the course pursued by these agents, no question could have arisen as to their liability to pay the license tax demanded of them. They would clearly have been exempt from such tax. But when the plaintiff shipped its harrows by car loads from the state of Michigan into the state of Virginia, deposited these goods in a warehouse in the town of Wytheville, and then, through its agents, loaded them on wagons, sent them through the country, selling and delivering them to purchasers from the wagons, it cannot be claimed that they were engaged in interstate commerce."

The above case states the rule, which is claimed in the case at bar:

1st That the business described was not interstate

commerce, because, the agent having the goods of the foreign corporation in his possession in the state sold the goods and delivered them: and

2nd. Because the foreign corporation established a warehouse and depot in the state for the storage and sale of its goods, and at such warehouse sold its goods and distributed them for sale.

An examination of the Michigan Act No. 79, 1893, providing for the payment of a franchise fee, shows that it does not discriminate between foreign corporations and domestic corporations.

All are required to pay the same fee.

And when the fee is paid by a foreign corporation, and its articles filed, and an agent duly appointed on whom process against the corporation may be served in Michigan, such foreign corporation then becomes entitled to do business in the State, and enjoys all the rights and privileges of a domestic corporation.

3 Howells Statute Sec. 4161 d 6.

Third.

The contract set forth in the record in this cause is within the prohibition of the Michigan Statute, Act 79 of the laws of 1893.

a.

The contract was made in the State of Michigan.

b.

Whether the last formal act of approval was done in this State, or not, the contract is within the prohibition of the Statute, because it contemplated and expressly provided for the doing of business in this State.

It provided:

1.

The making of sales and delivery of goods to purchases by the agent of the Company in Michigan: see first part of contract and No. 1 on page 1 of record, and Nos. 2 and 10 of contract on pages 2 and 3 of record.

2.

The establishment of a warehouse in Michigan for the storage of the goods of the Company in Michigan and sales there-from.

See Nos. 4 and 6 of contract on pages 2 and 3 of record.

3.

Said contract provides that plaintiff in error, under and pursuance of the contract. shall make other contracts for and in behalf of the Company, and as its agent in Michigan without the special approval of the Company on each contract at some point outside of this State.

c.

If it shall be held that the contract set forth in the record, was not made in this State, by reason of the formal approval being made in Ohio, then it is claimed that said contract is a plain evasion of the Michigan Statute; and on such ground it should be held that it comes within the prohibition of the Statute.

Upon this point see Seamans v. Temple Co. 105 Mich. 404, where the court uses the following language:

> "If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this state as though it had been made and was to be performed here. It cannot be supposed that the statutes cited were

intended merely to prevent the act of making the contract in this State. The object is to protect the citizens of this State against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this State. American Insurance Co. v. Stoy, 41 Mich. 401; Hartford Fire Insurance Co. v. Raymond, 70 Id. 501.

The argument of counsel for plaintiff is substantially this:

'We know that the laws of Michigan are designed to prevent our insuring Michigan property, but we have done so in a way that does not contravene the letter of the Michigan statute.

We have made our contract through the mail, and we have committed no violation of the Michigan statute, because we have done nothing upon Michigan soil. We have evaded your law, and obtained a contract which you have sought to prohibit, and now we ask you to enforce it for us under the doctrine of State comity.'

Under such circumstances, the courts of the state are not open to the offending company and the rule of state comity cannot be involved in its behalf."

In behalf of the State the Attorney General claims that the decision of the court below should be reversed.

FRED A. MAYNARD,
Attorney General of the
State of Michigan.

HOLDER v. AULTMAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 109. Argued November 8, 9, 1897. — Decided January 10, 1898.

Under a statute of a State, imposing a franchise tax on foreign corporations doing business in the State without having filed articles of association under its laws, and providing that "all contracts made in this State" after a certain date, "by any corporation which has not first complied with the provisions of this act, shall be wholly void," a contract of such a corporation, signed by its local agent and by the other party within the State, and stipulating that the contract is not valid unless countersigned by its manager in the State, and approved at its home office in another State, is not "made in this State," within the meaning of the statute, even if it is to be performed within the State.

THIS was an action of assumpsit, brought September 21, 1894, in the Circuit Court of the United States for the Eastern District of Michigan, by Aultman, Miller & Co., a corporation of the State of Ohio, against William Holder, a citizen of the State of Michigan, to recover the price of agricultural machines furnished by the plaintiff to the defendant, and sold by the defendant, under a contract in writing, the material parts of which were as follows:

"This agreement, made this 20th day of February, 1894, between Aultman, Miller & Co., a corporation duly incorporated under the laws of the State of Ohio, of Akron, Ohio, of the first part, and William Holder, of Laingsburgh, county of Shiawassee, and State of Michigan, of the second part, witnesseth, That the party of the second part is hereby authorized to sell Buckeye mowers, reapers and binders and extra parts thereof in the following territory, viz., Laingsburgh and vicinity," and other specified territory in Michigan, "for and during the season of 1894, on the following terms and conditions, viz.:

"The party of the second part agrees: First. To use all reasonable diligence in canvassing and supplying said terri-

tory with said machines." Second. "To sell the said machines at the retail list prices authorized by said first party;" "to grant credit to such persons only as are of well known responsibility;" "to see that all notes taken for machines sold are drawn on blanks furnished by the said first party;" "and, in all cases of doubt as to the responsibility of the purchaser, to require a mortgage on property, real or personal;" and to redeem all notes not accepted by the party of the first part. Third. To endorse, unless sufficiently secured, "all notes given by renters and parties owning no real estate." Fourth. "That all machines and parts of machines, and all other goods received on commission under this contract, shall be held by the said second party on special storage and deposit as the property of the party of the first part until converted into notes or money," and such notes shall remain the property of the first party; and, "in all cases where machines are sold for cash, or part cash and notes, all such cash received shall be promptly remitted." Fifth. "To see that all machines sold are properly set up and started;" and "to keep a correct record of sales." Sixth. To receive all "goods shipped or delivered on account of said first party;" to pay the freight on them, and keep them insured; "to keep all unsold goods well housed and cared for, subject to the order of the party of the first part;" and to make no charge for handling or storage. Seventh. To furnish "repairs, free of charge, to customers," only in case of flaw or defect. Eighth. "To make prompt and accurate reports of machines on hand, as often as requested by the first party or its general agent; to promptly execute orders for transfer of machines, if any are on hand unsold; and, in case of failure to make such report or transfers, to pay said first party, for all machines remaining on hand at settlement unsold by reason of such failure, at the option of said first party." Ninth. "To sell, or assist in the sale of, no other mowing machines, or combined mowing and reaping machines, or harvesters and binders, in said territory, during the continuance of this contract." Tenth. "To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time." Eleventh. To advertise this agency.

Statement of the Case.

"The party or the first part further agrees with the party of the second part: First. To furnish to said second party such machines of the kinds they make as may be wanted to supply said territory, so long as their stock on hand will enable them to fill the orders. No commission will be allowed on orders taken and not filled;" "nor shall any commission whatever be due said second party until a full settlement of account is made." Second. "To allow said second party as compensation for receiving, handling, storing, selling, setting up and starting machines, and making collections whenever required," certain specified commissions. Third. "To furnish the said second party a stock of extra castings and other repairs," to be sold on commission. Fourth. "To sell the said second party knives and sickles," and certain other things, at a discount of fifty per cent. Fifth. "To furnish said second party blank notes, orders, circulars and posters, and such other printed documents as they are accustomed to supply their agents.

"NOTICE. — It is especially agreed that when sales have not been closed by cash or notes on or before delivery, as stated above, then the party of the first part may send a person to settle with the purchasers of machines, and the party of the second part shall pay all the expenses of making such settlement. It is further agreed that Aultman, Miller & Co. shall not be held liable under any written or printed warranty given by them on their machines that are allowed to go out without first having been settled for. No canvassers or expert that may be sent to aid you shall have any authority to make any change whatever in our contract with you; and all sales made by him will be subject to your approval or rejection, as no allowance will be made to you for loss of interest or reduction in price on sales made by him; nor will any promise not authorized in writing by our manager at Lansing, Michigan, be recognized at settlement."

"In witness whereof, the parties hereunto have set their hands the day and date above written.

"AULTMAN, MILLER & Co.,
"By D. C. GILLETT.

"This contract not valid unless countersigned by our manager at Lansing, Michigan, and approved at Akron, Ohio.

"WM. HOLDER.

"Countersigned, Lansing, Michigan, Feb. 27, 1894.

"R. H. WORTH, Manager."

Across the back of the contract were written these words:

"Approved April 29, 1894. IRA M. MILLOY, Secretary."

The declaration alleged that "on February 27, 1894, at the said village of Laingsburgh and at the city of Lansing, in the Eastern District of Michigan, the said plaintiff, by D. C. Gillett and R. H. Worth, its duly authorized agents, entered into a written contract with the defendant, William Holder," above stated; and that "afterwards, to wit, on April 27, 1894, the said written contract was approved by the plaintiff at its office in the city of Akron, in the State of Ohio, and the same then and there became and was a binding and valid contract between the defendant and the plaintiff, according to the terms thereof, to wit, at the city of Lansing, in the Eastern District of Michigan;" that the plaintiff faithfully performed its contract, and in pursuance thereof shipped to the defendant a large number of mowers, reapers and binders, and extra parts for the same; and the defendant sold them under the contract, and became liable to pay the plaintiff the sum of $5052.56; and had never paid him that sum, or any part thereof. The declaration, besides a count on the contract, contained the common counts.

The defendant relied on the statute of Michigan of 1891, c. 182, § 1, as amended by the statute of 1893, c. 79, and copied in the margin;[1] and alleged that the contract sued on was

[1] An act to amend section one of act number one hundred and eighty-two of the public acts of eighteen hundred and ninety-one, entitled "An act to provide for the payment of a franchise fee by corporations," approved July two, eighteen hundred and ninety-one.

SECTION 1. The People of the State of Michigan enact, that section one of act number one hundred and eighty-two of the public acts of eighteen hundred and ninety-one, entitled "An act to provide for the pay-

made and to be performed in the State of Michigan, within the meaning of the statute; that the plaintiff, being a foreign corporation, was at the time of the execution of that contract doing business in the State of Michigan, within the meaning and application of the statute, and had not complied with its requirements; and that the contract was therefore absolutely void and without force as against the defendant.

The parties waived in writing a trial by jury, and submitted the case to the decision of the court, which found the following facts:

On April 29, 1894, the parties entered into the contract above stated; and it was executed, accepted and approved,

---

ment of a franchise fee by corporations," approved July two, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows:

SECTION 1. The People of the State of Michigan enact, that every corporation or association hereafter incorporated or formed by consolidation or otherwise, by or under any general or special law of this State, which is required by law to file articles of association with the secretary of state, and every foreign corporation or association which shall hereafter be permitted to transact business in this State, which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this State and been thereby authorized to do business therein, shall pay to the secretary of state a franchise fee of one half of one mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof, and that every corporation heretofore organized or doing business in this State, which shall hereafter increase the amount of its authorized capital stock, shall pay a franchise fee of one half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof: Provided, that the fee herein provided, except in cases of increase of capital stock, shall in no case be less than five dollars; and in case any corporation or association hereafter incorporated under the law of this State, or foreign corporation authorized to do business in this State, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this State shall pay a franchise fee of five dollars. All contracts made in this State after the the first day of January, eighteen hundred and ninety-four, by any corporation which has not first complied with the provisions of this act, shall be wholly void.

This act is ordered to take immediate effect.

Approved May 13, 1893.

as set forth therein, and in the indorsement thereon. Its provisions, so far as the plaintiff is concerned, have been fulfilled; and there is a balance due to the plaintiff under it of $5052.56. The plaintiff is a corporation organized and existing under the general laws of Ohio, having its corporation office and its manufactory at Akron in that State; and does not manufacture any goods in the State of Michigan. It sells its goods in Michigan by means of local commission agents, and has a general agent at Lansing in Michigan; its commission agents are under contracts with it similar to that sued on; and all contracts are sent to the plaintiff at Akron, for approval or rejection, before taking any effect. The goods manufactured by the plaintiff at its factory in Akron, and sold by it in Michigan, are shipped from the factory upon orders received from commission agents and forwarded by the general agent from Lansing to Akron. Goods are shipped, either directly to the commission agent, or in bulk to Lansing or elsewhere in Michigan, and reshipped in smaller lots to the commission agents. The plaintiff owns a warehouse in Lansing for the transfer of such reshipments, for the temporary storage of a small stock of extras or repairs, which experience has shown may be suddenly needed by customers throughout the State during the harvest season. Some of the commission agents throughout the State also keep on hand a very small stock of repairs for the immediate use of their customers. These are partly commission goods, and partly goods sold directly to them. Accounts with every commission agent in Michigan are kept at the plaintiff's office in Akron. The plaintiff effects settlements with its commission agents by sending copies of such accounts to its general agent, who goes over the season's work with each commission agent, collects the cash and notes taken in payment for machines sold, and forwards them to the plaintiff at Akron, subject to the plaintiff's approval or rejection of the notes. The notes are filed and kept by the plaintiff at Akron until just before maturity, when they are sent to the bank or to express agents for collection and remittance to Akron. The plaintiff has never filed a copy of its articles of association in the office of the

secretary of state or in any other office in Michigan, or paid any franchise fee to the State of Michigan, or in any way complied, or attempted to comply, with the statute above mentioned.

Upon these findings of fact the court made the following conclusions of law: 1st. The plaintiff's business, as carried on under and in pursuance of the contract, is an interstate commerce business; and the plaintiff is not subject to the aforesaid statute; and the statute, so far as it applies, or purports to apply, to foreign corporations like the plaintiff, which are doing an interstate commerce business, is in conflict with the provision of the Constitution of the United States authorizing Congress to regulate interstate commerce. 2d. The contract was made and executed in the State of Ohio, and does not provide for the transaction of any business in Michigan other than an interstate commerce business, and the plaintiff is therefore within the protection of the Constitution of the United States. 3d. The plaintiff is entitled to recover the sum of $5052.56. 68 Fed. Rep. 467.

Judgment was rendered for the plaintiff accordingly; and the defendant sued out a writ of error from this court, upon the ground that the case was one in which a law of a State was claimed to be in contravention of the Constitution of the United States, within the act of March 3, 1891, c. 517, § 5, 26 Stat. 828.

Mr. Clark C. Wood for plaintiff in error. *Mr. Frederick A. Maynard*, Attorney General of the State of Michigan, filed a brief on behalf of the same.

Mr. Frederick A. Baker and *Mr. John A. Bradley* for defendants in error. *Mr. Olin L. Sadler* was on their brief.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

This action was brought in the Circuit Court of the United States for the Eastern District of Michigan, by a manufactur-

ing corporation of the State of Ohio, having its principal office and its factory at Akron in that State, against one of its commission agents, a citizen of Michigan, to recover the price of agricultural machines sold by the defendant in Michigan under a contract in writing, by which the plaintiff authorized the defendant to sell, within a certain territory in Michigan, such machines supplied to him by the plaintiff; and the defendant agreed to canvass the territory, to sell the machines at retail prices fixed by the plaintiff, to hold the unsold machines as the plaintiff's property, to keep and render accounts of sales, and to remit the proceeds to the plaintiff.

The defendant relied on a statute of Michigan of May 13, 1893, which required every foreign corporation, permitted to transact business in that State, and not having filed articles of association under its laws, to pay a franchise tax of half a mill upon each dollar of its capital stock; and further provided that "all contracts made in this State after January 1, 1894, by any corporation which has not first complied with the provisions of this act, shall be wholly void." Michigan Public Acts 1893, c. 79, p. 82.

The Circuit Court, in giving judgment for the plaintiff, held that the contract was made in the State of Ohio, and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that State under the contract, was in conflict with the Constitution of the United States authorizing Congress to regulate interstate commerce. 68 Fed. Rep. 467.

This was therefore a "case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States," and was rightly brought directly to this court by writ of error under the act of March 3, 1891, c. 517, § 5. 26 Stat. 828. Upon such a writ of error, differing in these respects from a writ of error to the highest court of a State, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not

limited to the constitutional question, but includes the whole case. *Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Penn Ins. Co.* v. *Austin*, 168 U. S. 685.

But this court has not found it necessary to pass upon the constitutional question, because it is of opinion that the contract is not within the statute set up by the defendant.

By the clear terms of the statute of Michigan, the invalidity of the contract does not depend upon the place where, or the time when, it is to be performed, but upon its being "made in this State after January 1, 1894." A contract made before that date is valid, although it is to be performed afterwards; and a contract made elsewhere than in Michigan is valid, although it is to be performed in this State.

A contract is made when, and not before, it has been executed or accepted by both parties, so as to become binding upon both.

This contract is admitted to have been drawn up at Laingsburgh, in the State of Michigan, where the defendant resided. It begins by stating that it is "made this 20th day of February, 1894, between" the plaintiff and the defendant; and it ends with the clause, "In witness whereof, the parties hereunto have set their hands the day and date above written." Then follows the signature, "Aultman, Miller & Co., by D. C. Gillett," who may be assumed to have been the plaintiff's local agent at Laingsburgh. That signature is followed by a stipulation, evidently addressed by the plaintiff to the other party to the contract, in these words: "This contract not valid unless countersigned by our manager at Lansing, Michigan, and approved at Akron, Ohio." Then follows the signature of the defendant, "William Holder," who thereby necessarily assents to this stipulation, as well as to the other terms of the contract. Both parties thus agreed that the contract was not to be valid, until countersigned by the plaintiff's manager at Lansing in Michigan, and also approved at Akron in Ohio, the site of the plaintiff's principal office. It further appears, upon the contract itself, that it was afterwards, on February 27, 1894, countersigned at Lansing, by "R. H. Worth, Manager," and, by an endorsement on the contract,

that it was approved at Akron, April 29, 1894, as shown by the signature of "Ira M. Milloy, Secretary."

The plaintiff, in its declaration, alleged that on February 27, 1894, at Laingsburgh and Lansing, the plaintiff "by D. C. Gillett and R. H. Worth, its duly authorized agents, entered into a written contract with the defendant." The date on which the plaintiff "entered into" the contract with the defendant is thus alleged to have been, not February 20, 1894, mentioned at the beginning of the contract as the day on which it was made, and which may have been the day on which it was signed at Laingsburgh, by Gillett in behalf of the plaintiff, and by the defendant in person; but February 27, 1894, the day on which it was countersigned at Lansing by Worth, the plaintiff's manager. The plaintiff thus assumed that the contract did not exist as a contract before it was countersigned by the plaintiff's manager at Lansing; and there is no more reason for assuming that it existed as a contract before it was approved at the plaintiff's principal office at Akron; for the stipulation above quoted required both countersigning by the manager at Lansing, and approval at Akron, to make it a valid contract. Accordingly, the declaration further alleged that "afterwards, to wit, on April 29, 1894, the said written contract was approved by the plaintiff at its office in the city of Akron, and the same then and there was and became a binding and valid contract between the defendant and the plaintiff, according to the terms thereof." The words "to wit, at the city of Lansing, in the Eastern District of Michigan," would seem to have been added by way of formal venue only, in accordance with the ancient mode of pleading in suing upon a transaction which took place abroad. As Lord Mansfield said, "no judge ever thought that, when the declaration said in Fort St. George, viz. in Cheapside, that the plaintiff meant it was in Cheapside." *Mostyn* v. *Fabrigas*, Cowper, 161, 177. See also *McKenna* v. *Fisk*, 1 How. 241, 248.

The Circuit Court found, as facts, that the parties entered into the contract on April 29, 1894, which was the date of its approval at the plaintiff's home office in Ohio; and that

it was executed, accepted and approved, as set forth therein, and in the endorsement thereon.

Whether, therefore, we look to the contract itself, to the plaintiff's declaration, or to the findings of fact by the court, it clearly appears that the contract, when, after being drawn up in writing and signed by the plaintiff's local agent, it was tendered to the defendant and assented to and signed by him in Michigan, contained a distinct stipulation that it was not valid unless, not only countersigned by the plaintiff's manager in Michigan, but also approved at the plaintiff's principal office in Ohio; and that it was on April 29, 1894, and at Akron in the State of Ohio, that the contract was approved by the plaintiff's secretary at its principal office, and then and there, for the first time, became a valid and binding contract between the parties. It cannot therefore be considered as "made," within the meaning of the statute in question, at any earlier time, or other place.

The approval at the plaintiff's home office was not a ratification by the plaintiff of an unauthorized act of one of its agents; for each of its agents, Gillett in first signing the contract, and Worth in countersigning it, appears to have acted within the strict limits of his authority. But the final approval by the plaintiff itself was an act which, according to the express stipulation of the parties, and in the contemplation of every person who affixed his signature to the paper, was a necessary step to complete the execution of the instrument by the plaintiff, and to make it a valid and binding contract between the parties.

The opinion of the Supreme Court of the State of Michigan in *Seamans* v. *Temple Co.*, cited at the bar, contains nothing inconsistent with this conclusion. It was there held that a contract of insurance, made in another State by a corporation thereof, upon an application procured through its agents in Michigan upon property in Michigan, could not be sued on in the courts of Michigan, because of provisions of earlier statutes of Michigan, making it unlawful for any foreign insurance company to transact any business of insurance in the State, and for any person to aid in any way in procuring a

policy of insurance by a foreign corporation upon property in the State. Howell's Statutes, §§ 4331, 4354, 8136. And the court said: "If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this State as though it had been made and was to be performed here. It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this State." 105 Michigan, 400, 404.

The statute now before this court contains no such provisions as were contained in the statutes in question in that case; but it simply invalidates "contracts made in this State" by a foreign corporation which has not filed its articles of association in Michigan and paid the franchise tax imposed by this statute.

Judgment affirmed.